CHAPTER 60

ZONING AND OTHER LAND USE CONTROLS

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PART A. INTRODUCTION

§ 60.01 Scope and Purpose of Chapter

Zoning is the core of all land use regulation. Modern environmental management and planning policies have added layer upon layer of regulation to the type of zoning ordinance originally validated by the United States Supreme Court in *Village of Euclid v. Ambler Realty*.[1] Zoning classifications have become more complex and creative, often incorporating modern urban planning concepts and local growth and housing policies. In addition to zoning classifications, most jurisdictions now have a multiplicity of ordinances and regulations governing how and under what conditions land may be used by its owners.

From basic constitutional questions to specific statutory exemptions, the land use practitioner must be familiar with numerous issues to properly analyze a land use case. In addition to examining local zoning ordinances, the practitioner must take into account the interplay of federal, state, and regional environmental laws and regulations, such as the California Environmental Quality Act (CEQA),[2] as well as local general plans[3] and any applicable regional plans.[4]

The purpose of this chapter is to help practitioners analyze zoning issues. The chapter contains a comprehensive examination of the most common zoning and zoning-related land use controls, how they work, how they are enacted and applied, and how they might be defective or subject to challenge. "Practice Tips" are provided to bridge the gap between the statutory and case authority and everyday practice.

§§ 60.02–60.09 [Reserved]

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[1] Village of Euclid v. Ambler Realty Co. (1926) 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303.

[2] Pub. Res. Code § 21000 et seq.; *see* Chs. 20–23 for detailed coverage of CEQA.

[3] *See* Ch. 62, *Planning*.

[4] *See* § 60.91 (regional planning); Ch. 62, *Planning*.

PART B. ZONING

1. Types, Methods, and Requirements of Zoning

§ 60.10 Zoning Explained and Defined

Zoning is the exercise of police power[1] by a local government to control and regulate the uses and characteristics of buildings, structures, and land within its boundaries.[2] Zoning is the process of deciding where and how buildings and structures may be designed and located. Local jurisdictions accomplish zoning objectives by establishing zones by geographic area, known as zoning districts, or use districts.[3] Within these districts certain uses and characteristics are permitted, others are permitted only with issuance of a conditional use permit or under other specified conditions, and still others are completely prohibited. Although it may not be readily apparent in some cities today, the traditional purpose of zoning is "the attainment of unity in the construction and development of a city, along lines of reasonable regulations which tend to promote the health, safety, morals, and general welfare of the community."[4]

Zoning districts are typically defined by the general uses permitted within the zone. Initially, there were four basic types of zoning districts: residential, industrial, commercial, and agricultural. Local governments developed zoning maps classifying land into the various categories, accompanied by text describing the range of permissible uses. Such traditional zoning is commonly known as "Euclidean" zoning, after the United States Supreme Court decision upholding the validity of zoning ordinances.[5]

Although elements of Euclidean zoning survive today, contemporary social, political and environmental factors have led to far greater variation and flexibility in zoning districts and zoning standards. Traditionally, Euclidean zoning was based on the concept of separating uses. Historically it has resulted in land use patterns that keep residential, commercial, and industrial uses separate from each other to avoid conflicts between adjoining uses. Traditional zoning also emphasized uniformity: for example, single-family homes were separated in one district and were regulated with standardized setbacks, heights, and sizes.

Modern zoning practices, while striving to buffer clearly incompatible uses, tend to encourage more flexibility and more shared space, where people can work, live, and shop in their own neighborhoods and where neighborhoods may include a diversity of housing types. These contemporary practices emphasize balancing jobs and housing, and locating commercial uses in or near the communities they intend to serve. For example, Planned Unit Development (PUD) zoning[6] and mixed-use zoning[7] both

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[1] Cal. Const. art. XI, § 7.

[2] O'Loane v. O'Rourke (1965) 231 Cal. App. 2d 774, 780, 42 Cal. Rptr. 283; Gov. Code § 65850(a).

[3] Gov. Code § 65851.

[4] Miller v. Board of Public Works (1925) 195 Cal. 477, 495, 234 P. 381.

[5] Village of Euclid v. Ambler Realty Co. (1926) 272 U.S. 365, 389–390, 47 S. Ct. 114, 71 L. Ed. 303.

[6] *See* § 60.12[8].

provide greater zoning flexibility by allowing retail, office, and professional services to be located near the homes of residents who desire the convenience of nearby goods, services, and workplaces. Another modern trend is the use of "form-based zoning" which uses physical form rather than separation of uses as the organizing principle for the regulation of land uses.

§ 60.11 Types of Traditional Zoning Control Methods

[1] Use Restrictions

The fundamental type of regulation within a zoning district is to define the uses permitted within the zone. The four types of zoning district originally developed under Euclidean zoning (agricultural, residential, commercial, and industrial) generally remain in most modern zoning ordinances. Most jurisdictions consider these uses "cumulative," that is, a more restrictive use, such as residential, may be permitted within a less restrictive zone, such as commercial, unless specifically prohibited. In contrast, the zoning ordinance may specify that residential uses are not permitted in industrial zones except under specified circumstances or with additional approvals.

The text of the zoning ordinance may specify allowed uses or may include or refer to charts or lists of allowed uses. Single family zones are generally the most restrictive as to use, although constitutional limitations such as the right to privacy may limit the local jurisdictions ability to dictate such limitations.[1]

[2] Height and Mass Restrictions

Height and mass (also referred to as "bulk") restrictions are common to virtually every local zoning ordinance, but the particular requirements may vary among local governments. These restrictions are generally intended to establish and maintain uniformity in the physical characteristics of buildings and structures within each zone and are proper exercises of the zoning power.[2]

Height restrictions prescribe the maximum elevations of buildings and structures in various zones and are often listed in a local government's building code as well as its zoning ordinance. Although the height restrictions of buildings are usually uniform throughout a given zone, height restrictions on structures may vary depending on the type of structure and its use. For example, height restrictions may vary with regard to walls or fences depending on their location on the lot, and height requirements for accessory structures may vary from those applicable to the main structures. Height requirements may also vary for a residential use versus a commercial use in the same district.

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[7] *See* § 60.12[9].

[1] *See* § 60.65, *below*.

[2] *See* Sneed v. County of Riverside (1963) 218 Cal. App. 2d 205, 209, 32 Cal. Rptr. 318 (upholding validity of height restrictions); 55 Ops. Cal. Atty. Gen. 133 (1972) (opining that prohibitions on constructing single family dwellings below certain size are generally valid despite absence of case law specifically upholding validity of minimum size restrictions); Gisler v. County of Madera (1974) 38 Cal. App. 3d 303, 306, 112 Cal. Rptr. 919 (upholding validity of minimum lot size requirements).

Mass or bulk restrictions prescribe the size of buildings in relation to the size of the building lot, often through the use of allowable floor area ratios (or FAR) within each zone. Floor area ratios prescribe the allowable ratio between the square footage of the lot and the square footage of the building. Some local ordinances allow FAR to be averaged between lots in unified developments or transferred from one lot to another to promote clustering of bulk and retention of open space. Mass restrictions may also prescribe the maximum square footage of specific types of structures, such as carports and detached garages. Finally, mass restrictions may also be implemented through lot coverage requirements, limiting the amount of the lot which may be built on and thus requiring a degree of open space.

In order to restrict single family homes from overbuilding, height and mass restrictions may prescribe the maximum size of the home and require specified setbacks for higher floors to reduce the appearance of mass. Such restrictions may be referred to as "big house" or "mansionization" ordinances designed to restrict a modern trend of building massive single family homes that fill building sites and dwarf neighbors.[3] As a historical trend, traditional height and mass restrictions often sought to limit the *minimum* size of homes to promote neighborhoods of equal value, whereas modern restrictions tend to limit the *maximum* size of homes to prevent overbuilding of neighborhoods.

[3] Lot Area Restrictions

Lot restrictions are generally intended to preserve open space and control density within various zones. The common forms of lot restrictions include: minimum allowable lot sizes, building setback limits, and yard restrictions. Although lot size restrictions are most often specific mathematical requirements, many jurisdictions allow lot restrictions to be adjusted by shifting densities within a single development and "averaging" an allowable density by clustering structures.[4]

Establishing minimum lot sizes is a common and permissible means of preserving the desired amount of open space in low-density zones.[5] It is the most common means of establishing uniformity in residential zones and preserving uniform privacy, light and air, and open space characteristics. However, minimum lot size requirements must be reasonable given the particular circumstances in the neighborhood.[6] Lot area require-

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[3] *See, e.g.,* Los Angeles City Ordinances 179,883 (2008) and 184,802 (2017) establishing and amending the City's Baseline Mansionization Ordinance.

[4] *See, e.g.,* Topanga Assn. for a Scenic Community v. County of Los Angeles (1989) 214 Cal. App. 3d 1348, 1361, 263 Cal. Rptr. 214 (upholding shift in residential density from hillsides within single residential development).

[5] Clemons v. City of Los Angeles (1950) 36 Cal. 2d 95, 100–102, 222 P.2d 439; Gisler v. County of Madera (1974) 38 Cal. App. 3d 303, 307, 112 Cal. Rptr. 919; Gov. Code § 65850(c).

[6] *Compare* Clemons v. City of Los Angeles (1950) 36 Cal. 2d 95, 100, 222 P.2d 439 (upholding minimum lot size requirement of 5,000 square feet to prevent subdivision of existing bungalow courts where subdividing could create slum conditions), *with* Morris v. City of Los Angeles (1953) 116 Cal. App. 2d 856, 863, 254 P.2d 935 (invalidating same minimum lot size requirement of 5,000 square feet when

ments in multi-family residential zones will establish how many dwelling units may be built based on the area of the lot. This calculation is known as residential "density."

[4] Yard Requirements and Building Setbacks

Yard restrictions establish the minimum amount of space required around buildings. Yard requirements are prescribed as minimum front yard, side yard, and rear yard dimensions, and are generally applicable only to residential and mixed-use zones (or commercial zones abutting residential areas). The purpose of a yard requirement is to ensure that light, air, and open space are available for residential uses. In a mixed-use project, the ground floor commercial uses may not need to observe any yards or setbacks, while residential uses above the first floor must be setback. Yard requirements may also apply to residential uses, including hotels, in commercial zones. Certain structures, such as fences, pools, or accessory buildings may be permitted within side or rear yards.

Yard requirements are traditionally based on the design of a traditional single family home with a uniform unobstructed front yard, smaller side yards for safety, access and building separation, and large rear yards for a traditional private family backyard. Modern design trends in urban or master planned neighborhoods may allow greater flexibility as to where necessary open space should be located.

Building line or front setback requirements, similar to front yard requirements, may exist in all zones and prescribe the minimum distance between the street and the edge of any building. In contrast, some commercial (generally retail) districts *prohibit* building setbacks to preserve a "pedestrian orientation" and a uniform "zero setback" along the property line, which is designed to promote a uniform building edge inviting pedestrians into retail storefronts and activating business spaces.

[5] Parking Requirements

Most zoning ordinances require a minimum number of off-street parking spaces for specific land uses.[7] In commercial zones, the required number of off-street parking spaces is often identified by a ratio, in which one parking space is required for every specified number of usable square feet.[8] Some local governments allow off-street parking requirements to be provided off-site (within a prescribed distance) or "shared" between various commercial uses within a single commercial development.[9]

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ordinance prevented subdivision of lot into two residences in area where many houses were small and placed on small lots).

[7] *See, e.g.,* Los Angeles Municipal Code § 12.21(A)(4)(a)–(y); Los Angeles County Code § 22.112.070-A.

[8] *See, e.g.,* Los Angeles Municipal Code § 12.21(A)(4)(c)(1)–(7) (requiring one parking space for every 500 square feet of combined floor area for most commercial uses); Los Angeles County Code § 22.112.070-A (requiring one parking space for every 250 square feet of floor area for retail, or services uses, including medical and dental offices and one parking space for every 400 square feet of all other business and professional offices).

[9] *See, e.g.,* Los Angeles County Code § 22.178.010 (permitting off-site parking facilities); Los Angeles Municipal Code § 12.24(X)(20) (permitting two or more uses to share off-street parking based on differing peak hour parking demand).

Modern trends allow reduction of parking as a method to discourage use of automobiles. For example, bicycle parking may be used to offset parking requirements, or reduced parking may be allowed in areas close to mass transit.[10] In some downtown areas with ample public transit, the provision of off-street parking for commercial uses may be limited with a maximum rather than minimum allowance for on-site parking.[11]

In residential zones, off-street parking is required and a covered garage or carport may be mandated. Increased parking may be required for guests in parking congested areas, such as coastal areas. The required number of parking spaces is generally determined by reference to the number of habitable rooms in a multi-family residential unit. Parking reductions may be allowed for specialized housing, such as affordable, permanent supportive or senior housing.[12] Preferential parking restrictions and permitting procedures in residential zones are valid measures for preventing the use of street parking by persons who do not reside in the neighborhood.[13]

[6] Site Plan or Development Review

Some zoning ordinances require detailed review of proposed developments over specified threshold sizes, even when the use, height, and bulk are within required zoning.[14] Such review may require a "site plan review permit" or "development permit." It may be performed on a staff or administrative level, or may require a noticed hearing before the planning commission or other decision making body. Development may then be reviewed on a case by case basis, and additional restrictions may be imposed as necessary to ensure that the goals and objectives of the zoning code are met. Site plan review poses the possibility that, even if a use is a permitted use under the zoning ordinance, an applicant's proposal may be restricted or rejected based on site

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[10] *See, e.g.,* Los Angeles Municipal Code § 12.21(A)(4) (permitting residential buildings to reduce automobile parking by up to 30% when replacing automobile parking with bicycle parking at a 4:1 ratio); Los Angeles Municipal Code § 12.24(X)(17) and § 12.24(Y) (parking reductions permitted where a commercial or industrial building provides transportation alternatives or is located within 1,500 feet from transit facility).

[11] *See, e.g.,* San Diego Municipal Code § 142.0530 (establishing both minimum and maximum parking ratios for retail sales, commercial services, offices, and mixed-use development).

[12] *See, e.g.,* Los Angeles Municipal Code § 12.22(A)(25)(d) (reduced parking requirements for affordable housing); Los Angeles Municipal Code § 14.00 (A)(13)(d)(2)(1) (no parking requirement for permanent supportive housing); Los Angeles Municipal Code § 12.21(A)(4)(U) (50% parking reduction allowed for senior and disabled housing).

[13] County Board of Arlington County v. Richards (1977) 434 U.S. 5, 7, 98 S. Ct. 24, 54 L. Ed. 2d 4; *see* Veh. Code § 22507.

[14] *See, e.g.,* Los Angeles Municipal Code § 16.05 et seq.; Los Angeles County Code § 22.186.010 et seq.

plan review.[15] At least one court has upheld the denial of a permitted use when the proposal failed the site plan review process.[16]

[7] Aesthetics and Design Review

Review requirements may be designed solely to protect aesthetics. Architectural or design review may be required for all projects over a specified threshold or may be required, through adoption of an overlay zone[17] only in specified geographic areas. It is clear that aesthetics are now a legitimate government interest and a valid basis for the exercise of police power through zoning ordinances.[18] An architectural review board may be established comprised of qualified professionals and local community members. Aesthetic quality and harmony with adjoining architectural styles may be required.[19] A public art requirement or in-lieu fee may also be a legitimate part of a local government's aesthetic controls.[20] Local design standards may be adopted for specific uses such as parking structures, which may be required to include landscaping, screening, or ground floor commercial uses. Community design standards may be adopted by zoning or as part of a community plan or general plan.

[8] Conditional Zoning

Some jurisdictions will tailor zoning to the specific application for a development project. Like site plan review, this method allows the decision maker to approve only the specific building design, parking, access, layout, and use in the application.[21] This type of zoning is sometimes referred to as "conditional zoning" or "contract zoning." Despite the lack of "uniformity" within a zoning district engendered by this type of site-specific conditional zoning, its use has been upheld.[22] Some zoning ordinances include specific procedures for the imposition and removal of zoning conditions.[23]

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[15] If the site plan review process involves the exercise of discretion by the agency, compliance with the California Environmental Quality Act (CEQA) may be required. In fact, in some jurisdictions, site plan review has been enacted to create a mechanism to implement CEQA for large projects which are otherwise permitted by right in the zone. For a complete discussion of CEQA, see chs. 20–23.

[16] Wesley Inv. Co. v. County of Alameda (1984) 151 Cal. App. 3d 672, 678, 198 Cal. Rptr. 872.

[17] *See* § 60.12[3].

[18] *See* Tahoe Regional Planning Agency v. King (1991) 233 Cal. App. 3d 1365, 1395, 285 Cal. Rptr. 335; *see also* Metromedia, Inc. v. City of San Diego (1981) 453 U.S. 490, 507–508, 101 S. Ct. 2882, 69 L. Ed. 2d 800; Guinnane v. San Francisco CPC (1989) 209 Cal. App. 3d 732, 740–741.

[19] *See* Laguna Beach Taxpayers' Asso. v. City Council of Laguna Beach (1960) 187 Cal. App. 2d 412, 415, 9 Cal. Rptr. 775, *overruled on other grounds*, Associated Home Builders Etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 135 Cal. Rptr. 41, 557 P.2d 473; *see also* Breneric Associates v. City of Del Mar (1998) 69 Cal. App. 4th 166, 176, 81 Cal. Rptr. 2d 324; Bohannan v. City of San Diego (1973) 30 Cal. App. 3d 416, 422–423, 106 Cal. Rptr. 333.

[20] Ehrlich v. City of Culver City (1996) 12 Cal. 4th 854, 886, 50 Cal. Rptr. 2d 242, 911 P.2d 429, *cert. denied*, 519 U.S. 929, 117 S. Ct. 299, 136 L. Ed. 2d 218.

[21] *See* Scrutton v. County of Sacramento (1969) 275 Cal. App. 2d 412, 417, 79 Cal. Rptr. 872.

[22] J-Marion Co. v. County of Sacramento (1977) 76 Cal. App. 3d 517, 523, 142 Cal. Rptr. 723.

[23] *See, e.g.,* Los Angeles Municipal Code § 12.32(G)(2).

PRACTICE TIP: Identify Discretionary Decisions Early. It is important for developers to identify early in the approval process any and all aspects of a property's zoning which may require discretionary acts by the local agency and to attempt to obtain simultaneous approval of all such requirements. These actions will avoid the necessity of duplicative notices and hearings, and prevent a second opportunity for opposition to a controversial project. Thus, for example, a developer will want to avoid obtaining all required project approvals, including a zone change, only to find that additional hearings and actions are subsequently required for design review approval. Often compliance with design, art, site plan, signage or performance review may require a high degree of specificity in project applications at an early stage of the development process.

§ 60.12 Types of Modern Zoning Controls

[1] Zoning Beyond *Euclid*

Although Euclidean zoning remains in many areas, local governments have developed new types of zoning districts to address specific social and environmental realities within their communities as well as to provide greater flexibility in making land use decisions. In addition to regulating use, size, and mass, many zoning districts now allow local governments greater control over the design, form, character, and operation of uses and structures. These districts may be used alone or in combination to add flexibility to land use controls in a given area. These modern types of zoning districts and zoning controls are discussed in § 60.12[2]–[10], *below*.

[2] Floating Zones

Unlike traditional zoning districts, which exist on zoning maps and delineate the permitted uses within geographic areas, floating zones are not specific to geographical areas. Essentially, a floating zone is a prefabricated zone change, a fully described zone existing only in the text of the zoning ordinance until the local government imposes the floating zone on a specific parcel or area, thereby rezoning the parcel from its existing zone to the floating zone. Most often, a floating zone is imposed when a developer applies for a zone change to develop a parcel according to the permitted uses within the floating zone. A floating zone may be understood as an invitation to developers to propose the kind of development permitted within the floating zone and to demonstrate why the proposed development is appropriate for the particular site. For example, in an effort to promote the development of furniture and design showrooms in a commercial neighborhood, an incentive for height and floor area may be included in a floating zone, to be applied to the property only upon application for a qualifying project. A common example of a floating zone is a planned unit development zone.[1]

[1] For a discussion of planned unit developments, see § 60.12[8], *below*.

[3] Overlay Zones

An overlay zone is an additional layer of zoning regulations placed over the existing zoning. Overlay zones most often impose additional zoning regulation, but they sometimes lessen standards in the underlying zone, to address the impacts of specific nearby uses or environmental characteristics. Examples of overlay zones include airport zones, flood plain zones, hazardous fault zones, and mineral extraction zones. Overlay zones may also be used to impose additional restrictions within specified geographic areas. For example, architectural review may be required only within a designated "old town" or "village center" overlay zone. Specified design standards may apply through an overlay zone imposed on a pedestrian-oriented commercial district to promote walkability. An overlay zone may be used to add an incentive or new use to an existing zone district, such as adding mixed use development to an existing commercial-only zone under specified conditions.

An overlay zone may also be implemented as a "use district" or "supplemental district." For example, this overlay may be added to existing uses to allow and regulate horse keeping in residential zones, signage in commercial zones, or oil drilling in any zone. An overlay may impose additional environmental requirements in geographic areas impacted by specific conditions, such as areas adjacent to rivers or areas near environmental brownfields.

[4] Performance Zoning

Some zoning ordinances include performance zoning which includes standards for specified uses within specified zones. This approach eliminates the need for project-level review of individual projects for certain common uses. Thus, outdoor dining at ground floor restaurants may be permitted in any commercial zone so long as specified landscaping, parking, fencing, noise attenuation, and other requirements are met.[2] Similarly specified performance standards may be established for such uses as hotels, gas stations, automobile repair, schools, and mini-malls adjoining or within a specified distance from residential property. Thus, such uses will be allowed in specified zones as long as all performance standards are incorporated into the design and operation of the project.

[5] Transit-Oriented Zoning

To promote transit use and lessen dependence on automobiles, some urban areas have rezoned properties well-served by transit for higher density and more intensive use. For example, an area directly served by a fixed rail station may allow increased residential density through an automatic bonus calculation contained in the zoning. Similarly, areas along public transit corridors may be rezoned to incentivize development with less parking, more local serving businesses and more housing.

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[2] *See, e.g.,* Los Angeles County Code § 22.28.070(G).

[6] Historic Preservation Districts

An overlay zone[3] may be utilized to create a historic district whose purpose is to preserve the character of an entire area based on its historical qualities. State enabling statutes authorize city and county regulations to protect, enhance, or perpetuate sites and buildings with special historical or aesthetic value.[4] In addition to site-by-site designations, the statutes also allow creation of historic districts to control the appearance and the use of neighboring property. The term "neighboring property" encompasses the entire nearby area, not merely adjoining parcels, and localities have broad discretion in setting district boundaries.[5]

Many local governments have enacted historic preservation overlay zoning districts (HPOZ) under this authority. The overlay zone generally imposes use restrictions and architectural, aesthetic, building, maintenance, and rehabilitation standards designed to maintain the integrity of the historic district. The restoration or alteration of buildings within the historic preservation overlay zone will require review and approval by staff or a local historic preservation board applying a set of historic preservation guidelines or a local preservation plan.

[7] Specific Plan Zones

Although technically a part of the general plan, a specific plan is often used in conjunction with a zoning classification to set detailed and comprehensive standards for development of a specific geographic area. This method is used, for example, in suburban master planned communities and in urban areas, where a specific plan is adopted and the zoning designation for the geographic area is changed to reflect and incorporate the specific plan. These specific plan zoning designations operate similarly to the planned unit development zoning discussed at § 60.12[8], *below*. See Chapter 62, *Planning*, for complete discussion of specific plans.

[8] Planned Development Zones

A "Planned Development" (PD) is a zoning classification that permits flexibility in the siting and design of development within a designated area. One type of PD zone is a "Planned Unit Development" (PUD) which refers to a development consisting of residential lots that will be individually owned and common areas owned by all the lot owners in common, in addition to adjacent neighborhood commercial areas.[6] The PD zoning classification allows a master-planned community to include a variety of uses in one zone. Modern trends use the PD zoning designation to allow review of site-specific development standards to respond to the needs of a project site.

The advantage of PD zoning is that it permits flexibility in site planning and clustering of structures. The use of the PD approach to zoning is part of the modern

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[3] *See* § 60.12[3], *above*.

[4] Gov. Code §§ 25373, 37361.

[5] Bohannan v. City of San Diego (1973) 30 Cal. App. 3d 416, 421, 106 Cal. Rptr. 333.

[6] *See* CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 261, *Types of Zoning Controls* (Matthew Bender).

trend away from the rigid, lot-by-lot land classification that is characteristic of traditional Euclidean zoning. PD zoning allows greater opportunities for mixing diverse uses and for clustering development and open space according to the natural contours and features of the land.

Local zoning ordinances may establish a PD zoning district or may allow PDs as a conditional use within other zoning districts. In either case, the PD designation will be applied to a specific geographic area once an application is submitted.

The use, density, and site development regulations in PD zoning ordinances are usually more general than those in conventional zoning ordinances, although some ordinances do impose specific use and density restrictions and performance standards, such as limits on building coverage. PD ordinances require a developer to submit proposed development plans for case-by-case review and approval, and they allow the reviewing agency to attach conditions to development approval.

PD site plan review usually takes place in stages. The developer first submits a preliminary development plan (also known as a master plan or site plan) describing the general characteristics of the project, then submits a final development plan (also known as a precise development plan) describing the project in more detail. The local government approves the master development plan by rezoning to a PD district. This rezoning is a legislative act, requiring adoption or amendment of an ordinance.[7] Commonly, a final development plan or minor changes to an adopted plan may be approved administratively. However, any change that materially and fundamentally alters the physical characteristics of the district may only be accomplished through the legislative procedure for rezoning.[8]

California courts have consistently recognized the legitimacy of the PD approach to zoning even though state planning statutes are silent on the subject. For example, in *Orinda Homeowners Committee v. Board of Supervisors*,[9] the court upheld a PUD ordinance against a claim that PUD zoning violated the uniformity requirement.[10]

For additional discussion of PD zones and planned unit developments, see CALIFORNIA REAL ESTATE LAW AND PRACTICE, Chapter 261, *Types of Zoning Controls* (Matthew Bender).

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[7] City of Sausalito v. County of Marin (1970) 12 Cal. App. 3d 550, 562, 90 Cal. Rptr. 843 (approval of PUD master plan invalid if by resolution rather than by ordinance). Procedures for adopting or amending a zoning ordinance are discussed in §§ 60.20 and 60.21.

[8] Millbrae Asso. for Residential Survival v. Millbrae (1968) 262 Cal. App. 2d 222, 245, 69 Cal. Rptr. 251.

[9] Orinda Homeowners Committee v. Board of Supervisors (1970) 11 Cal. App. 3d 768, 90 Cal. Rptr. 88.

[10] Orinda Homeowners Committee v. Board of Supervisors (1970) 11 Cal. App. 3d 768, 773, 90 Cal. Rptr. 88; *see* Avco Community Developers, Inc. v. South Coast Regional Com. (1976) 17 Cal. 3d 785, 796, 132 Cal. Rptr. 386, 553 P.2d 546, *cert. denied*, 429 U.S. 1083, 97 S. Ct. 1089, 51 L. Ed. 2d 529 (1977) (assuming validity of planned unit development); City of Sausalito v. County of Marin (1970) 12 Cal. App. 3d 550, 556–557, 90 Cal. Rptr. 843 (upholding rezoning creating planned community district); Millbrae Asso. for Residential Survival v. Millbrae (1968) 262 Cal. App. 2d 222, 226, 69 Cal. Rptr. 251 (assuming validity of planned unit development).

[9] Mixed-Use Zoning

Traditionally, commercial and residential uses have been separated, or treated as cumulative under the Euclidean zoning concept of allowing some residential uses in commercial zones but no commercial uses in residential zones. In contrast, modern urban trends have developed a mixed-use zone where commercial development can be included in a residential project, generally on the ground floor of multi-family residential structures. Mixed-use zones may also allow a mix of residential units and retail uses within a single parcel or adjoining parcels. The mixed-use concept is encouraged as a method of reducing traffic congestion by providing retail services in residential projects, allowing residential uses in commercial areas, and promoting efficient use of urban land. Some jurisdictions provide incentives for mixed-use projects such as reduced parking requirements or increased allowable floor area.

Mixed-use configurations can be used in urban areas to create pedestrian-friendly neighborhoods or to provide diverse housing opportunities in generally commercial areas. Within an urban core, a mixed-use zone may allow residential, commercial, and industrial uses within one zone, for example, to promote a creative arts district.

[10] Form-Based Zoning

Form-based zoning uses physical form rather than separation of uses as the organizing principle for the regulations. Form-based zoning can be adopted as part of a specific plan or a general plan update, or as a comprehensive zoning code update. Form-based zoning codes focus less on the use taking place inside a building and more on the built form and character of a neighborhood. Form-based regulations will include detailed graphics addressing the placement and form of buildings, the character of the street frontage, and the size and mass of buildings in relation to one another and to public spaces. In addition to text, form-based codes include graphics, diagrams, and plans to represent the permitted form and building relationships. Unlike design or architectural guidelines or general statements of design policy, form-based codes are regulatory, not advisory.

The intent of form-based codes is to foster predictable built results and strive for a higher-quality built environment by regulating not just physical form but also the relationship of buildings to each other and to public spaces, such as sidewalks and streets. Form-based codes are an alternative to conventional zoning intended to regulate a neighborhood's character. For example, instead of a zone being labeled "single-family residential," it may be called "traditional neighborhood" and emphasize the size and placement of individual residential buildings.[11]

PRACTICE TIP: Seek Creative Zoning. If a proposed development project does not fit within any established zoning standards in your local jurisdiction, staff or the applicant should explore innovative zoning solutions. For example, rather

[11] *See* www.formbasedcodes.org.

than try to conform a large residential subdivision to existing zones, a Specific Plan can be developed with site-specific development standards for each area of the development and each type of housing product. Or, rather than process numerous variances for construction of a unique use in an established commercial zone, staff might develop a new "overlay zone" with flexible development standards to meet the project's needs.

§ 60.13 Interim Ordinances

[1] Temporary Measures Restricting Development

[a] Validity of Interim Ordinances

California law authorizes the enactment of interim ordinances that impose temporary restrictions on development while a city or county revises or updates its general plan or zoning ordinance.[1] Short-term emergency measures may be enacted without a hearing as urgency ordinances,[2] or the full procedures for adopting zoning ordinances may be followed. In *Miller v. Board of Public Works*,[3] the California Supreme Court expressly recognized that comprehensive land use planning is a time-consuming process that would be seriously jeopardized if parties were allowed to embark on particular development projects while the legislative body was developing its permanent plan.[4]

Following *Miller*, courts have generally upheld interim measures as long as they preserve the status quo and are reasonably necessary to promote the public health, safety, or general welfare.[5] The interim ordinance will be found valid even when reasonable minds differ as to its necessity.[6] Further, barring a clearly discriminatory effect, courts generally will not consider the motives of the legislative body when reviewing the legality of an interim land use ordinance.[7]

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[1] Gov. Code § 65858; Miller v. Board of Public Works (1925) 195 Cal. 477, 496, 234 P. 381, *appeal dismissed*, 273 U.S. 781, 47 S. Ct. 460, 71 L. Ed. 889 (1927) (upholding interim ordinance adopted in contemplation of a general zoning ordinance covering the City of Los Angeles).

[2] Gov. Code § 65858; the procedures for enacting an emergency interim zoning ordinance are discussed at § 60.13[2], *below*.

[3] Miller v. Board of Public Works (1925) 195 Cal. 477, 234 P. 381, *appeal dismissed*, 273 U.S. 781, 47 S. Ct. 460, 71 L. Ed. 889 (1927).

[4] Miller v. Board of Public Works (1925) 195 Cal. 477, 496, 234 P. 381, *appeal dismissed*, 273 U.S. 781, 47 S. Ct. 460, 71 L. Ed. 889 (1927).

[5] *See, e.g.,* 216 Sutter Bay Associates v. County of Sutter (1997) 58 Cal. App. 4th 860, 869, 68 Cal. Rptr. 2d 492 (new city council properly adopted interim urgency zoning ordinance to prevent vesting of development agreements entered into by lame-duck city council, in light of a pending referendum on the general plan amendment that was the basis for the development agreements); Metro Realty v. County of El Dorado (1963) 222 Cal. App. 2d 508, 514, 35 Cal. Rptr. 480 (upholding enactment of interim zoning ordinance prohibiting subdivision of lands and construction of buildings pending county's creation of water development and conservation plan).

[6] Metro Realty v. County of El Dorado (1963) 222 Cal. App. 2d 508, 514–515, 35 Cal. Rptr. 480.

[7] Anderson v. City Council (1964) 229 Cal. App. 2d 79, 91, 40 Cal. Rptr. 41; *cf.* G & D Holland

[b] Effect of Interim Ordinances on Pending Development Applications

Since interim ordinances often are enacted in reaction to the submission of particular development applications, the question frequently arises whether an interim ordinance may be applied to deny these prior applications. The general rule is that, absent facts or legal documents to establish vesting, a property owner does not have a vested right in current zoning regulations,[8] and that the filing of an application does not entitle the applicant to proceed under the law in effect at the time of filing. Under this rule, a permit may be denied even when a permit application complies with the law at the time of its submission, if a subsequently enacted interim ordinance prohibits the use.[9]

Thus, one court has upheld a county's refusal to issue a building permit for a gasoline station because the county was considering an interim ordinance that would require use permits for gas stations.[10] The court followed the general rule that the application for the building permit does not vest any rights in the applicant. The court further noted that an administrative body may, because of a subsequent change in zoning laws, revoke a building permit after granting it, if the permittee has not yet made substantial improvements in good faith reliance on the permit.[11]

Courts will not uphold an interim ordinance, however, when a local agency has enacted the measure in bad faith to frustrate the development plans of a particular permit applicant. Thus, in one case a county enacted an emergency ordinance prohibiting mortuaries and other commercial uses on cemetery grounds, immediately following loss of a court challenge brought by a cemetery owner seeking to build a mortuary. The court of appeal held the interim ordinance invalid, noting, among other factors, that there was no evidence that the ordinance formed any part of a zoning plan or that the county had considered such an ordinance before the trial court's decision.[12] Similarly, a city may not impose a new emergency permit requirement on a project that has already obtained vested rights pursuant to the city regulations in effect at the time the project was approved.[13]

Construction Co. v. City of Marysville (1970) 12 Cal. App. 3d 989, 994–995, 91 Cal. Rptr. 227 (courts may not scrutinize legislative motives unless classification unfairly discriminates against property owner).

[8] For discussion of vested rights, see Ch. 61, *Subdivision Regulation*; *see also* § 60.82[3].

[9] Atlantic Richfield Co. v. Board of Supervisors (1974) 40 Cal. App. 3d 1059, 1063–1065, 115 Cal. Rptr. 731.

[10] Atlantic Richfield Co. v. Board of Supervisors (1974) 40 Cal. App. 3d 1059, 1063, 115 Cal. Rptr. 731.

[11] Atlantic Richfield Co. v. Board of Supervisors (1974) 40 Cal. App. 3d 1059, 1065, 115 Cal. Rptr. 731, *citing* Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal. 3d 110, 125, 109 Cal. Rptr. 799, 514 P.2d 111. For discussion of vested rights, see § 60.82[3].

[12] Sunset View Cemetery Assn. v. Kraintz (1961) 196 Cal. App. 2d 115, 123, 16 Cal. Rptr. 317; *see* Kieffer v. Spencer (1984) 153 Cal. App. 3d 954, 961–962, 200 Cal. Rptr. 755 (interim ordinance invalid when city official admitted discriminatory purpose); G & D Holland Construction Co. v. City of Marysville (1970) 12 Cal. App. 3d 989, 994–996, 91 Cal. Rptr. 227 (if interim ordinance evinces discriminatory design against property owner, trial court must look beyond ordinance's stated goal to determine whether illicit purpose exists).

[13] Stewart Enterprises, Inc. v. City of Oakland (2016) 248 Cal. App. 4th 410, 203 Cal. Rptr. 3d 677

[c] Interim Ordinance May Not Prohibit Processing of Applications

Because Gov. Code § 65858 authorizes the adoption of interim ordinances prohibiting any "uses" that may be in conflict with a proposed general plan or zoning ordinance, it does not authorize a city to adopt an interim ordinance prohibiting the formal processing of development applications.[14] In *Building Industry Legal Defense Found. v. Superior Court*,[15] the court of appeal held that the power to establish "uses" does not include the power to establish procedures for processing development applications. Once a permitted use is identified by the applicable zoning ordinance, the procedure for processing a development application is not established by zoning but may be regulated by other state laws, such as the Subdivision Map Act.[16] The court stated that given that the Subdivision Map Act has established a comprehensive procedure for processing subdivision applications, and nothing in it allows a city to prohibit the processing of a tentative subdivision map that is complete. A city may not use an interim ordinance as a "backdoor" method to modify these procedural rules.[17]

[d] Interim Ordinance May Not Impede Housing

An interim control ordinance that impacts housing is subject to several restrictions. Any interim ordinance that has the effect of denying approvals needed for the development of projects with a significant component of multifamily housing[18] may not be extended unless the legislative body adopts specific written findings supported by substantial evidence on the record regarding the necessity of the extension.[19]

Further, an exception to the validity of interim control measures and growth control measures was enacted in 2019 with respect to any land where housing is an allowable use.[20] Gov. Code § 66300(b) provides that certain defined urbanized cities and counties may not enact a development policy, standard, or condition that would impede housing

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(subsequently imposed emergency ordinance requiring a conditional use permit for a crematorium could not be imposed on permit vested pursuant to a city's permit-vesting ordinance).

[14] Building Industry Legal Defense Found. v. Superior Court (1999) 72 Cal. App. 4th 1410, 1420, 85 Cal. Rptr. 2d 828.

[15] Building Industry Legal Defense Found. v. Superior Court (1999) 72 Cal. App. 4th 1410, 85 Cal. Rptr. 2d 828.

[16] Building Industry Legal Defense Found. v. Superior Court (1999) 72 Cal. App. 4th 1410, 1416–1417, 85 Cal. Rptr. 2d 828; *see* Gov. Code § 66451 ("The procedures set forth in this chapter shall govern the processing, approval, conditional approval or disapproval and filing of tentative, final and parcel maps and the modification thereof").

[17] Building Industry Legal Defense Found. v. Superior Court (1999) 72 Cal. App. 4th 1410, 1420, 85 Cal. Rptr. 2d 828.

[18] "Projects with a significant component of multifamily housing" means projects in which multifamily housing consists of at least one-third of the total square footage of the project. Gov. Code § 65858(h).

[19] Gov. Code § 65858(c)(1)–(3); *see* Hoffman Street LLC v. City of West Hollywood (2009) 179 Cal. App. 4th 754, 768, 102 Cal. Rptr. 3d 125 (legislative body required to make findings set forth in Gov. Code § 65858(c)(1)–(3) if extension of interim ordinance has effect of preventing development of multifamily housing).

[20] Gov. Code § 66300(b) (repealed Jan. 1, 2025 if not extended; Gov. Code § 66301).

production, including but not limited to imposing a moratorium or similar restriction or limitation on housing development, and establishing or implementing any growth control limitation, including permit quotas, unit caps, or population limitations.

[2] Procedures for Enacting Emergency Measures

Gov. Code § 65858 specifies the procedures by which counties and cities, including charter cities, may enact emergency interim ordinances on an urgency basis for a maximum of two years.[21] Without following the procedures ordinarily required before the adoption of a zoning ordinance,[22] the legislative body may enact an emergency interim ordinance prohibiting uses that may conflict with a contemplated general plan, specific plan, or zoning proposal that the city is considering, studying, or intends to study within a reasonable time.[23] The emergency interim ordinance, which requires a four-fifths vote of the legislative body, is only effective for 45 days. After notice and hearing, however, the legislative body may extend the interim ordinance for 10 months and 15 days, and subsequently extend it for one year. No more than two extensions may be adopted, and each extension requires a four-fifths vote of the legislative body.[24]

Alternatively, if the emergency interim ordinance is enacted after notice and hearing, it is still effective for only 45 days, but it may then be extended for 22 months and 15 days.[25] Any interim ordinance adopted or extended according to this alternative procedure requires a four-fifths vote of the legislative body.[26]

Whichever procedure is used, the interim ordinance must include a finding that there is a current and immediate threat to the public health, safety, or welfare, and that the approval of additional use entitlements would result in a threat to the public health, safety, or welfare.[27] A mere recitation that there is a threat is not enough to support the finding, and the court will use its independent judgment to review the evidence of threat. Generally, pending permit applications must show the immediacy of the threat, and "mere inquiries, requests, and meetings do not constitute a current and immediate threat" of new entitlements or development.[28]

When an interim ordinance has been adopted, every subsequent interim ordinance covering the whole or a part of the same property automatically terminates on the

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[21] *See* Bank of the Orient v. Town of Tiburon (1990) 220 Cal. App. 3d 992, 1003–1007, 269 Cal. Rptr. 690, *overruled on other grounds*, Morehart v. County of Santa Barbara (1994) 7 Cal. 4th 725, 29 Cal. Rptr. 2d 804, 872 P.2d 143 (Gov. Code § 65858 occupies entire field of interim zoning moratoria, including moratoria enacted by initiative; thus, initiative extending interim moratorium for a third time was invalid).

[22] *See* §§ 60.20, 60.21.

[23] Gov. Code § 65858(a).

[24] Gov. Code § 65858(a); *see* Martin v. Superior Court (1991) 234 Cal. App. 3d 1765, 1770–1772, 286 Cal. Rptr. 513 (third sequential development moratorium was "subsequent ordinance" that was invalid under Gov. Code § 65858(e)).

[25] Gov. Code § 65858(b).

[26] Gov. Code § 65858(b).

[27] Gov. Code § 65858(c).

[28] California Charter Schools Assn. v. City of Huntington Park (2019) 35 Cal. App. 5th 362, 371, 247 Cal. Rptr. 3d 412, 420.

termination of the first interim ordinance or any extension of that ordinance.[29] However, on termination of a prior interim ordinance, a legislative body may adopt another interim ordinance, if the new interim ordinance is adopted to protect the public safety, health, and welfare from an event, occurrence, or set of circumstances different from the event, occurrence, or set of circumstances that led to the adoption of the prior interim ordinance.[30]

The procedures set forth in Gov. Code § 65858 do not apply to charter cities.[31] Unless specifically prohibited by their charter, charter cities may enact moratorium ordinances for periods longer than the maximum of two years permitted under Gov. Code § 65858, and such ordinances do not require a four-fifths vote for adoption. However, a moratorium for a protracted period of time could prove vulnerable to a takings challenge.[32]

§ 60.14 Growth Controls

[1] Regulation of Growth

Many California communities, especially in suburban and rural areas, have adopted mechanisms designed to regulate the place, timing, and location of growth and large scale development. Such growth control measures may be instituted by legislative ordinance, by voter initiative, or as part of the general plan process, and may supersede existing zoning regulations.

See Chapter 63, *Growth Management and Development Limits*, for a complete discussion of growth control measures. For a discussion of growth control measures and affordable housing, see § 60.90[3][b].

[2] Types of Controls; Impact on Housing

Growth controls can take various forms. Some involve strict quotas or limitations; others require voter approval for any substantive changes to the general plan or voter approval for new development projects over a certain size; still others involve a more subtle emphasis on "smart growth" to encourage infill development and allow suburban growth only when infrastructure, fire protection, and other services are available. However, in certain urbanized areas, state law prohibits a growth control measure that would impede housing production by, for example, implementing a growth control limitation which includes permit quotas, unit caps, or population limitations.[1]

Although current trends support maximizing housing development, older growth control measures targeted housing. One form of growth control, sometimes termed

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[29] Gov. Code § 65858(e).

[30] Gov. Code § 65858(f). The Legislature has declared its intent that an ordinance that complies with this subsection and was in existence on or before April 14, 1997, will not be invalidated if challenged under Gov. Code § 65858(e). *See* 1997 Stats., ch. 129, § 2.

[31] Gov. Code § 65803.

[32] *See* Ch. 65, *Takings and Other Constitutional Controls*.

[1] *See* Gov. Code § 66300(b) (repealed Jan. 1, 2025 if not extended; Gov. Code § 66301).

"phased growth control," establishes a fixed numerical quota on the number of residential building permits that will issue in a jurisdiction each year.[2] These ordinances may exempt certain types of housing; for example, an ordinance might exempt affordable housing or senior housing. Permits are often allocated through competitive evaluation systems that rank proposed residential projects according to standards such as conformity with the general plan, location, affordability, and environmental sensitivity.

Another form of growth control is the development moratorium. A growth control moratorium typically prohibits issuance of permits for certain types of development for a fixed period of time or until certain public facilities, service standards, or planning studies are completed.[3]

Local governments also attempt to limit growth indirectly by refusing to expand the capacity of public service facilities or to extend public services or utilities such as water or sewer lines to undeveloped areas.[4] Some jurisdictions have measures in place which require a vote of the people to approve any general plan amendment in an effort to discourage new development; similarly some jurisdictions have requirements for voter approval of large scale commercial or residential developments.

[3] Validity of Quotas and Moratoria

In the past, temporary quotas and growth control moratoria have been upheld against challenges based on substantive due process,[5] equal protection,[6] the commerce clause,[7] the contract clause,[8] vagueness,[9] the right to travel,[10] and lack of compliance with statutory procedural requirements designed to protect the regional affordable housing

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[2] For examples of this type of control, see Building Industry Assn. v. City of Camarillo (1986) 41 Cal. 3d 810, 815, 226 Cal. Rptr. 81, 718 P.2d 68; Lee v. City of Monterey Park (1985) 173 Cal. App. 3d 798, 802, 219 Cal. Rptr. 309; C-Y Development Co. v. City of Redlands (1982) 137 Cal. App. 3d 926, 928, 187 Cal. Rptr. 370; Simac Design, Inc. v. Alciati (1979) 92 Cal. App. 3d 146, 158, 154 Cal. Rptr. 676 (Morgan Hill growth controls); Construction Industry Asso. v. Petaluma (9th Cir. 1975) 522 F.2d 897, 904, *cert. denied*, 424 U.S. 934, 96 S. Ct. 1148, 47 L. Ed. 2d 342 (1976).

[3] *See, e.g.,* Associated Home Builders, Inc. v. Livermore (1976) 18 Cal. 3d 582, 596–597, 135 Cal. Rptr. 41, 557 P.2d 473 (moratorium on residential development until education, sewer, and water facilities in city met specified standards); Builders Assn. of Santa Clara-Santa Cruz Counties v. Superior Court (1974) 13 Cal. 3d 225, 230–231, 118 Cal. Rptr. 158, 529 P.2d 582, *appeal dismissed*, 427 U.S. 901, 96 S. Ct. 3184, 49 L. Ed. 2d 1195 (1976) (two-year prohibition on rezoning to residential use unless developer supplies school facilities).

[4] *See, e.g.,* Dateline Builders, Inc. v. City of Santa Rosa (1983) 146 Cal. App. 3d 520, 528, 194 Cal. Rptr. 258 (extension of services contingent on compliance with general plan policy encouraging compact growth).

[5] Construction Ind. Ass'n, Sonoma Cty. v. City of Petaluma (9th Cir. 1975) 522 F.2d 897, 905, *cert. denied*, 424 U.S. 934, 96 S. Ct. 1148, 47 L. Ed. 2d 342 (1976).

[6] Builders Assn. of Santa Clara-Santa Cruz Counties v. Superior Court (1974) 13 Cal. 3d 225, 232–233, 118 Cal. Rptr. 158, 529 P.2d 582, *appeal dismissed*, 427 U.S. 901, 96 S. Ct. 3184, 49 L. Ed. 2d 1195 (1976).

[7] Construction Ind. Ass'n, Sonoma Cty. v. City of Petaluma (9th Cir. 1975) 522 F.2d 897, 909.

[8] Simac Design, Inc. v. Alciati (1979) 92 Cal. App. 3d 146, 158, 154 Cal. Rptr. 676.

supply.[11] Controlled growth has been recognized by courts as a legitimate end in itself, independent of the traditional health and safety concerns usually invoked to justify land use regulation.[12] On the other hand, California courts have also required that this slow growth interest be balanced against the potential detrimental effects of growth controls on the region's welfare as a whole, such as restriction of housing opportunities for lower income households.[13] The legislature has prohibited certain defined urbanized cities and counties from enacting a development policy, standard, or condition that would impede housing production, including any moratorium, growth control limitation, permit quota, unit cap, or population limitation.[14]

[4] Validity of Service Restrictions

Traditionally, courts have held that local jurisdictions and service districts have a duty to meet the demand for municipal services created by development, including a duty to extend service lines to developing areas and to maintain sufficient capacity to service present and future growth.[15] However, more recent court decisions have allowed communities to limit or suspend service connections, at least temporarily, if the community can point to constraints on the service facilities' carrying capacity.[16]

Service restrictions may not be used to control development and growth by an entity that does not have the power to establish a slow growth policy. For example, one court held that a moratorium on new water hookups was justified by a threatened water shortage. It noted, however, that the water district could not restrict the water supply to limit growth because, unlike a city or county, a water district does not have the authority to initiate or implement land use policy.[17]

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[9] Associated Home Builders Etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 596–600, 135 Cal. Rptr. 41, 557 P.2d 473.

[10] Associated Home Builders Etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 603–604, 135 Cal. Rptr. 41, 557 P.2d 473; Builders Assn. of Santa Clara-Santa Cruz Counties v. Superior Court (1974) 13 Cal. 3d 225, 233, 118 Cal. Rptr. 158, 529 P.2d 582, *appeal dismissed*, 427 U.S. 901, 96 S. Ct. 3184, 49 L. Ed. 2d 1195 (1976).

[11] Associated Home Builders Etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 596–600, 135 Cal. Rptr. 41, 557 P.2d 473; *see* § 60.90, *below*.

[12] Construction Ind. Ass'n, Sonoma Cty. v. City of Petaluma (9th Cir. 1975) 522 F.2d 897, 908–909.

[13] *See* § 60.90, *below*.

[14] Gov. Code § 66300(b) (repealed Jan. 1, 2025 if not extended; Gov. Code § 66301).

[15] Lukrawka v. Spring Valley Water Co. (1915) 169 Cal. 318, 329–330, 146 P. 640 (duty of water company to anticipate and accommodate future population growth).

[16] Gilbert v. State of California (1990) 218 Cal. App. 3d 234, 250–252, 266 Cal. Rptr. 891; Hollister Park Inv. Co. v. Goleta County Water Dist. (1978) 82 Cal. App. 3d 290, 293–294, 147 Cal. Rptr. 91; Swanson v. Marin Mun. Water Dist. (1976) 56 Cal. App. 3d 512, 519, 128 Cal. Rptr. 485; *but see* McMillan v. Goleta Water Dist. (9th Cir. 1986) 792 F.2d 1453, 1457, *cert. denied*, 480 U.S. 906, 107 S. Ct. 1348, 94 L. Ed. 2d 519 (1987) (distinguishing potential water users from existing users, and allowing suspension of service only as to the former for conservation purposes).

[17] Swanson v. Marin Mun. Water Dist. (1976) 56 Cal. App. 3d 512, 524, 128 Cal. Rptr. 485.

A local body that does have the authority to adopt a growth limitation policy, such as a city council, may implement the policy through a service moratorium.[18] One court viewed use of a water district's powers to prevent importation of water as a legitimate exercise of the locality's right to self-determination,[19] and another found that local jurisdictions have broad power to refuse to extend utility service.[20]

§§ 60.15–60.19 [Reserved]

2. Adoption and Amendment of Zoning Ordinances

§ 60.20 Overview of Zoning Legislative Process

[1] Adoption and Amendment as Legislative Acts

[a] Requirements for Adoption and Amendment

The adoption and amendment of zoning, including the rezoning of an individual parcel, are legislative acts[1] and must be accomplished by ordinance.[2] County and general law city zoning ordinances must be consistent with the general plan.[3] Zoning enactments of a charter city are also required to be consistent with that city's general plan.[4]

Zoning amendments may take one of two forms:

- An amendment to the zoning designation of a specific parcel of land (usually accomplished by amendment of the zoning map alone); or
- An amendment of the text of the zoning ordinance changing the permitted uses or regulations affecting particular zones.

Both acts are legislative, no matter how small the affected individual parcel may be, and, unless required by local ordinance, findings are not required to support such legislative decisions.[5]

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[18] Wilson v. Hidden Valley Mun. Water Dist. (1967) 256 Cal. App. 2d 271, 286, 63 Cal. Rptr. 889.

[19] Wilson v. Hidden Valley Mun. Water Dist. (1967) 256 Cal. App. 2d 271, 285–288, 63 Cal. Rptr. 889.

[20] Dateline Builders, Inc. v. City of Santa Rosa (1983) 146 Cal. App. 3d 520, 530, 194 Cal. Rptr. 258.

[1] Arnel Development Co. v. City of Costa Mesa (1980) 28 Cal. 3d 511, 516–518, 169 Cal. Rptr. 904, 620 P.2d 565 (rezoning is legislative act regardless of size of parcel rezoned or number of landowners affected); *but see* Southwest Diversified, Inc. v. City of Brisbane (1991) 229 Cal. App. 3d 1548, 1556, 280 Cal. Rptr. 869 (zoning ordinance that revised provisional boundaries contained in previous ordinance was administrative act not subject to challenge by referendum).

[2] Gov. Code § 65850.

[3] Gov. Code § 65860.

[4] Gov. Code § 65860.

[5] Arnel Development Co. v. City of Costa Mesa (1980) 28 Cal. 3d 511, 514, 169 Cal. Rptr. 904, 620 P.2d 565; Cormier v. County of San Luis Obispo (1984) 161 Cal. App. 3d 850, 855, 207 Cal. Rptr. 880.

[b] Minimum Procedures

Although the requirements of procedural due process do not apply to the adoption or amendment of zoning ordinances,[6] state law imposes minimum procedural requirements for counties and general law cities that include requirements for notice and hearing.[7] These requirements do not apply to charter cities, unless included in the city's charter or code.[8] These requirements also do not apply to zoning by voter initiative.[9]

State law requires that the local government's planning commission must first provide notice and hold a public hearing on a proposed zoning ordinance.[10] The commission then renders its decision in the form of a written recommendation to the legislative body of the locality (i.e., the city council or board of supervisors) that explains the reasons for the commission's decision and discusses the relationship of the proposal to applicable general and specific plans.[11]

After receiving the planning commission's recommendation and providing notice, the legislative body must also hold a public hearing on the proposed ordinance.[12] However, the legislative body is not required to act on a proposed rezoning measure if the commission has recommended against the rezoning, unless required by local ordinance to do so or an interested party requests a hearing within five days of the commission's recommendation.[13]

A "streamlined zoning process," under which the county gave notice of a hearing by the board of supervisors before the planning commission made its recommendation on a proposed amendment to the zoning ordinance, violated the Planning and Zoning Law.[14] When a planning commission is required to hold a hearing and make a recommendation, the board's hearing notice cannot be published until the commission has (1) completed its hearing, (2) adopted its recommendation, and (3) formally delivered the recommendation. Furthermore, the board hearing notice must include the commission's recommendation.[15]

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[6] Compare, however, the procedural due process requirements for a quasi-judicial zoning decision, see § 60.33.

[7] Gov. Code §§ 65853–65857.

[8] Gov. Code § 65803.

[9] *See* DeVita v. County of Napa (1995) 9 Cal. 4th 763, 785–787, 38 Cal. Rptr. 2d 699, 889 P.2d 1019; *see also* Associated Home Builders Etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 596, 135 Cal. Rptr. 41, 557 P.2d 473.

[10] Gov. Code § 65854; *see* § 60.20[2], *below* (requirements for notice).

[11] Gov. Code § 65855.

[12] Gov. Code § 65856.

[13] Gov. Code § 65856.

[14] Environmental Defense Project of Sierra County v. County of Sierra (2008) 158 Cal. App. 4th 877, 881, 70 Cal. Rptr. 3d 474.

[15] Environmental Defense Project of Sierra County v. County of Sierra (2008) 158 Cal. App. 4th 877, 893, 70 Cal. Rptr. 3d 474.

The legislative body may approve, disapprove, or modify the planning commission's recommendation.[16] An affirmative vote of a majority of the members of the legislative body is required for passage.[17]

PRACTICE TIP: Appealing a Zoning Recommendation or Decision. Check local ordinances carefully regarding the need to file an appeal of a Planning Commission recommendation on a zoning ordinance. Although many codes appear to provide for the automatic transfer of all zoning recommendations to the legislative body, in many cases a close reading of the zoning ordinance will reveal that the practitioner must file an appeal to preserve all rights. The appeal will ensure that:

- The legislative body receives a zoning ordinance when the Planning Commission recommends against its adoption;
- The legislative body has the authority to modify the Planning Commission's recommendation; and
- The applicant or opponent has exhausted its administrative remedies in the event of a legal challenge.

The legislative body must refer back to the planning commission any modification to the proposed ordinance not previously considered by the commission, although another public hearing is not required.[18] If a city council decides to rezone only one of several pieces of land after the planning commission recommended the rezoning of all of the parcels, it has been held that this is not a change of the commission's recommended action requiring referral back to the commission, but only a partial adoption of the rezoning amendment.[19] When a modification is referred back to the planning commission, the commission is deemed to have approved the modification if it fails to report back to the legislative body within 40 days.[20]

[c] Effective Date

Ordinances generally take effect 30 days after passage.[21] However, an ordinance may take effect immediately if it is expressly adopted as an urgency measure. Urgency

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[16] Gov. Code § 65857.

[17] Gov. Code §§ 25005, 36936 (requires recorded majority vote of total membership of city council); 58 Ops. Cal. Atty. Gen. 706 (1975) (Gov. Code § 25005 requires action by majority of members of county board of supervisors, not merely majority of quorum).

[18] Gov. Code § 65857.

[19] Millbrae Assn. for Residential Survival v. Millbrae (1968) 262 Cal. App. 2d 222, 235, 69 Cal. Rptr. 251.

[20] Gov. Code § 65857.

[21] Gov. Code §§ 25123, 36937.

measures must be necessary for the immediate preservation of the public peace, health, or safety, and must be passed by a four-fifths vote of the legislative body.[22]

An urgency measure may be deemed fatally defective unless the urgency language (i.e., reciting the factual basis for the urgency) is declared in the ordinance.[23] However, the declaration itself may be prima facie evidence of the urgency, and it has been held that the preservation of aesthetics may form a proper basis for an urgency measure.[24]

[2] Notice

Notice and hearing are not constitutionally required before adopting or amending zoning ordinances because the doctrine of procedural due process does not apply to legislative acts.[25] By contrast, the due process clause does impose procedural requirements on administrative or quasi-judicial acts such as the approval of conditional use permits and variances.[26]

The minimum requirements for notice are spelled out in the state statute. Notice of a zoning hearing must generally be given at least 10 days before the date of the hearing.[27] The notice must be (1) published in at least one newspaper of general circulation within the local area, or posted in three public places within the local government's jurisdiction if there is no such newspaper, and (2) delivered to persons who have requested notification or have been designated for notice by the governing body.[28] If the ordinance or amendment affects permitted uses on real property, notice of the public hearing before the planning commission must also be delivered at least 10 days before the hearing to the following:[29]

- The property owner or the owner's agent;
- The project applicant;
- Local service-providing agencies whose ability to provide services may be significantly affected by the proposal; and

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[22] Gov. Code §§ 25123(d), 36937(b).

[23] West Hollywood Concerned Citizens v. City of West Hollywood (1991) 232 Cal. App. 3d 486, 492–493, 283 Cal. Rptr. 470.

[24] Crown Motors v. City of Redding (1991) 232 Cal. App. 3d 173, 179, 283 Cal. Rptr. 356 (upholding urgency measure meant to prevent auto dealership from erecting electronic advertising reader board).

[25] San Diego Bldg. Contractors Assn. v. City Council (1974) 13 Cal. 3d 205, 211, 118 Cal. Rptr. 146, 529 P.2d 570, *appeal dismissed*, 427 U.S. 901, 96 S. Ct. 3184, 49 L. Ed. 2d 1195 (1976) (voters could enact ordinance limiting height without giving notice and hearing to affected landowners).

[26] Horn v. County of Ventura (1979) 24 Cal. 3d 605, 614, 156 Cal. Rptr. 718, 596 P.2d 1134; San Diego Bldg. Contractors Assn. v. City Council (1974) 13 Cal. 3d 205, 212, 118 Cal. Rptr. 146, 529 P.2d 570, *appeal dismissed*, 427 U.S. 901, 96 S. Ct. 3184, 49 L. Ed. 2d 1195 (1976); Hayssen v. Board of Zoning Adjustments of Sonoma (1985) 171 Cal. App. 3d 400, 404, 217 Cal. Rptr. 464, *cert. denied*, 476 U.S. 1114, 106 S. Ct. 1969, 90 L. Ed. 2d 653 (1986); *see* §§ 60.30–60.34 for coverage of conditional use permits and variances.

[27] Gov. Code §§ 65090(a), 65092.

[28] Gov. Code §§ 65090(a), 65092.

[29] Gov. Code § 65091(a).

- Owners of property within 300 feet of the subject property.

When notice is delivered to property owners within 300 feet, it must also be published or posted in three public places within the jurisdiction, including one public place within the area directly affected by the proposal. Alternatively, the notice may be published[30] in at least one newspaper of general circulation within the local agency conducting the proceeding at least 10 days before the hearing.[31] The same notice must be provided to neighboring landowners who are not residents of the city or county in which the property is located.[32]

When the hearing concerns a permit for a drive-through facility, or the adoption or amendment of policies or ordinances affecting drive-through facilities, the local agency must incorporate, when necessary, notice procedures to the blind, aged, and disabled communities in order to facilitate their participation in the hearing or an appeal.[33]

The minimum contents of the notice are also spelled out by statute. The notice must specify the following:[34]

- The date, time, and place of the hearing;
- By whom the hearing will be held;
- A general explanation of the matter under consideration; and
- A general description of the subject property's location.

The failure of a party to receive notice given in accordance with these procedures shall not be grounds for invalidating the agency's action in court.[35] Although compliance with state law notice requirements is the local jurisdiction's responsibility, local ordinances may place certain notification responsibilities directly on the applicant, such as providing notification lists with the application or posting the site.

PRACTICE TIP: Check Local Notice Requirements. The state law notice requirements are minimums. Remember to check local ordinances and procedures. Many jurisdictions require a substantially longer notice period, a larger radius for notification, notification of occupants as well as owners, or posting of the property with a notice sign of specified size and contents. Also be sure to determine how compliance with the local notice requirement will be implemented and verified. The applicant may be required to give notice by posting official notices on the affected site. Some require large signage that needs time to be printed and installed. Many jurisdictions require the applicant to file photographic evidence of posting or

[30] *See* Gov. Code § 6061.

[31] Gov. Code § 65091(a)(5).

[32] Scott v. City of Indian Wells (1972) 6 Cal. 3d 541, 549, 99 Cal. Rptr. 745, 492 P.2d 1137.

[33] Gov. Code §§ 65090(d), 65091(d).

[34] Gov. Code § 65094.

[35] Gov. Code § 65093.

an affidavit regarding the posted notice, and they may refuse to go forward with the hearing in the absence of proper documentation.

[3] Hearing Procedure

State law includes minimum standards for hearing procedures for zoning matters if a hearing is held, and these standards apply to charter cities as well as counties and general law cities.[36] All local zoning agencies must develop and publish procedural rules for public hearings on zoning matters.[37] These rules need not follow judicial rules of evidence and procedure[38] and in practice tend to be very informal. For example, witnesses are generally not put under oath, and their testimony can include content otherwise inadmissible in a court of law, such as hearsay.[39] When a hearing is contested and a written request for recordation is made before the hearing, the hearing must be recorded and the record must be kept and preserved. A copy of the recording must be made available to the public at cost.[40] For a zone change hearing for a parcel of 10 acres or more, a planning staff report with recommendations, stating the basis for such recommendations, must be prepared.[41] Any planning staff reports prepared for a hearing must be made available to the public before or at the beginning of the hearing, and must be made part of the public record.[42]

[4] Effect of Procedural Error

Procedural errors may not be used to automatically invalidate a zoning ordinance adopted without full compliance with any state or local requirement. A court may invalidate a zoning action based on procedural error only if the court finds that the error was prejudicial, the appealing party suffered substantial injury from the error, and a different result would have been probable without the error.[43] For example, one court held that an error in a notice describing an adjacent road by its prior name was not prejudicial because nearby property owners received both actual and constructive notice of the construction of a sawmill two years before they challenged a conditional use permit issued to the sawmill.[44] Similarly, another court found that publishing the

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[36] Gov. Code § 65804.

[37] Gov. Code § 65804(a).

[38] Gov. Code § 65010(a).

[39] Mohilef v. Janovici (1996) 51 Cal. App. 4th 267, 289–298, 58 Cal. Rptr. 2d 721.

[40] Gov. Code § 65804(b).

[41] Gov. Code § 65804(d).

[42] Gov. Code § 65804(c).

[43] Gov. Code § 65010(b); *see* Rialto Citizens for Responsible Growth v. City of Rialto (2012) 208 Cal. App. 4th 899, 920, 146 Cal. Rptr. 3d 12 (although notice was required to include planning commission's recommendations, plaintiff made no attempt to show in the trial court, and trial court did not find, that the defective notice resulted in prejudice or substantial injury to anyone, or that a different result was probable absent the defect; thus, as a matter of law, general plan and specific plan amendments and development agreement were erroneously invalidated based on defective notice).

[44] Hayssen v. Board of Zoning Adjustments of Sonoma (1985) 171 Cal. App. 3d 400, 408, 217 Cal.

required notice only six days before the hearing, instead of the required 10 days, did not amount to prejudicial error.[45] There is no presumption that any error is prejudicial, and a showing of prejudice will be unique to each case.[46]

PRACTICE TIP: Calendar All Notice Dates and Requirements. Although prejudicial error is required for a notice deficiency to invalidate a zoning action, practitioners should be cautious and ensure that all stated requirements and deadlines are met. Do not rely on planning staff to calendar, but double check that deadlines are being met. Also ensure that the record contains evidence of how and when the notice was provided.

[5] Charter Cities

In the absence of a charter provision or local ordinance to the contrary, a charter city is not required to provide notice and hearing before enacting or amending a zoning ordinance. The Government Code exempts charter cities from the requirements relating to zoning ordinances, including requirements for notice and hearing.[47] However, charter cities are subject to the minimum procedural standards for zoning hearings specified in Gov. Code § 65804 if and when they do hold zoning hearings. In practice, noticed hearings are generally held in charter cities pursuant to local charter or ordinance requirements.

§ 60.21 Initiative and Referendum

Because the enactment or amendment of zoning is a legislative act accomplished by ordinance, zoning may also be enacted by initiative and is subject to referendum.[1] A referendum may be used to repeal any zoning ordinance. Initiative petitions may be used to enact zoning or rezone a particular area or parcel.

Generally, zoning by initiative or referendum in counties and general law cities must be consistent with the adopted general plan.[2] Zoning initiatives in charter cities do not have to be consistent with that city's general plan unless the city adopts a consistency

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Rptr. 464, *cert. denied*, 476 U.S. 1114 (1986); *see* Hilton v. Bd. of Supervisors of Santa Barbara County (1970) 7 Cal. App. 3d 708, 715–716, 86 Cal. Rptr. 754 (conflicting notices of planning commission hearing on zoning amendment did not constitute prejudicial error).

[45] City of Sausalito v. County of Marin (1970) 12 Cal. App. 3d 550, 555–557, 90 Cal. Rptr. 843.

[46] Gov. Code § 65010(a).

[47] Gov. Code § 65803; *see* Gov. Code §§ 65853–65857.

[1] Arnel Development Co. v. City of Costa Mesa (1980) 28 Cal. 3d 511, 514, 169 Cal. Rptr. 904, 620 P.2d 565.

[2] Lesher Communications, Inc. v. City of Walnut Creek (1990) 52 Cal. 3d 531, 544–545, 277 Cal. Rptr. 1, 802 P.2d 317 (zoning initiative that was inconsistent with general plan when adopted by voters ruled invalid).

requirement in its charter.[3] Thus a city council's decision not to submit a certified referendum petition to the voters was upheld because repeal of the ordinances challenged by the petition would result in the subject property being zoned in a manner inconsistent with the city's general plan.[4]

But, a referendum was allowed on a zoning ordinance designed to bring a residential area into consistency with the general plan, where the court found that the referendum did not seek to enact a new or different zoning ordinance; it simply sought to put the existing ordinance before the voters. If the voters rejected it, the zoning ordinance would return to the status quo, which was inconsistent at the time the city council amended the general plan. The referendum would not create the inconsistency. This result simply stressed the need for a city to amend its general plan and any conflicting zoning ordinance at the same time, in order to avoid the result of creating an inconsistent zoning ordinance.[5]

The conflicting reasoning in these general plan consistency cases was resolved in part when the California Supreme Court found that a referendum may result in a temporary inconsistency with the general plan in certain circumstances.[6] For a discussion of general plan consistency and initiatives, see § 60.81.

See Chapter 75, *Local Land Use Initiatives and Referendums*, for a complete discussion of initiatives and referenda.

§§ 60.22–60.29 [Reserved]

3. Conditional Use Permits and Variances

§ 60.30 Conditional Use Permits and Variances Distinguished

Conditional use permits (CUPs) and variances are the most common land use entitlements used to grant relief from the strict terms of local zoning ordinances. CUPs (sometimes denominated "use permits" or "special use permits") allow certain uses or activities specifically authorized in the zoning ordinance, provided such uses further the objectives of the zoning ordinance and promote the general welfare. By contrast, variances grant exceptions from zoning ordinance restrictions for properties with

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[3] Garat v. City of Riverside (1991) 2 Cal. App. 4th 259, 281, 3 Cal. Rptr. 2d 504, *overruled on other grounds*, Morehart v. County of Santa Barbara (1994) 7 Cal. 4th 725, 729, 29 Cal. Rptr. 2d 804, 872 P.2d 143.

[4] DeBottari v. City Council of Norco (1985) 171 Cal. App. 3d 1204, 1208, 217 Cal. Rptr. 790; *see* City of Irvine v. Irvine Citizens Against Overdevelopment (1994) 25 Cal. App. 4th 868, 879, 30 Cal. Rptr. 2d 797 (withholding of inconsistent zoning referendum justified by charter city where consistency requirement adopted by ordinance) (reasoning disapproved in City of Morgan Hill v. Bushey (2018) 5 Cal. 5th, 1068, 1080–1081, 236 Cal. Rptr. 3d 835, 423 P.3d 960).

[5] Save Lafayette v. City of Lafayette (2018) 20 Cal. App. 5th 657, 229 Cal. Rptr. 3d 238.

[6] City of Morgan Hill v. Bushey (2018) 5 Cal. 5th 1068, 1080–1081, 236 Cal. Rptr. 3d 835, 423 P.3d 960. The Court disapproved of the reasoning in deBottari v. City Council (1985) 171 Cal. App. 3d 1204, 1212, 217 Cal. Rptr. 790 (such a referendum would "enact" an invalid zoning ordinance that would be inconsistent with the general plan) and City of Irvine v. Irvine Citizens Against Overdevelopment (1994) 25 Cal. App. 4th 868, 874–879, 30 Cal. Rptr. 2d 797 (following *deBottari*).

unique physical characteristics that render compliance with zoning a practical hardship. For general law cities and counties, these two procedures are governed by Gov. Code §§ 65901–65911. General law cities and counties may supplement the state statutory scheme, so long as the minimum state standards are met. Charter cities may provide their own different regulations governing the granting of variances and use permits.

Unlike the enactment of zoning, which is a legislative act, granting a variance or CUP is a quasi-judicial act.[1] Each decision on a variance or CUP must look at the specific facts associated with the property and project. The issuance of a variance or CUP does not amount to a rezoning; it merely adjusts the controls on a particular property without amending the underlying ordinance.[2] An inferior body, city official, or hearing officer may grant applications for use permits or variances, and adoption of an ordinance is not required by the legislative body. Decisions take the form of resolutions or determinations. Each determination must include findings in support of the issuance of the CUP or variance. Judicial review lies under the administrative mandamus procedure.[3]

CUPs and variances are both quasi-judicial decisions to entitle specific projects which do not fit within the parameters of the "by right" zoning of a property. A CUP generally allows a use so long as it is compatible with the general welfare and does not negatively impact adjoining uses, while the variance may only be issued on a showing of specific hardship and special circumstances. Both generally run with the land.[4] Both CUPs and variances should advance, not undermine, the policies of the local zoning ordinance.[5] Finally, due to their discretionary nature, both the issuance of a CUP and the grant of a variance are "projects" subject to the California Environmental Quality Act (CEQA).[6]

For additional discussion and an Application for Rezoning, Conditional Use Permit, or Variance (City of Oakland form), see CALIFORNIA LEGAL FORMS, Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits*, § 30B.200 (Matthew Bender).

§ 60.31 Conditional Use Permits

[1] Authority; Nature and Purpose; Findings

Most zoning ordinances specify certain uses as of right and certain other uses allowed only by use permit for each zone. This mechanism enables localities to control uses that may be desirable, but whose unrestricted existence at a specific location could engender a nuisance. Most conditionally permitted uses are such that the use could

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[1] W.W. Dean & Associates v. City of South San Francisco (1987) 190 Cal. App. 3d 1368, 1375, 236 Cal. Rptr. 11.

[2] Essick v. City of Los Angeles (1950) 34 Cal. 2d 614, 624, 213 P.2d 492 (CUP); Bringle v. Board of Supervisors (1960) 54 Cal. 2d 86, 88, 4 Cal. Rptr. 493, 351 P.2d 765 (variance).

[3] Code Civ. Proc. § 1094.5; *see* § 60.100 (scope of judicial review).

[4] Cohn v. County Board of Supervisors (1955) 135 Cal. App. 2d 180, 184, 286 P.2d 836.

[5] Zakessian v. City of Sausalito (1972) 28 Cal. App. 3d 794, 801, 105 Cal. Rptr. 105.

[6] Pub. Res. Code § 21000 et seq. For detailed coverage of CEQA, see Chs. 20–23.

easily become incompatible with the surrounding uses, especially residential uses. Other types of conditionally permitted uses (for example, mineral extraction or drive-through businesses) may raise specific issues such as traffic, noise, or health and safety, requiring close scrutiny regarding the desirability of the location and the need to impose conditions on the use to protect against nuisance. Common uses allowed by CUP are liquor stores, alcohol service at restaurants, cannabis retail locations, and automotive repair, and places of worship, schools, or hotels in residential zones. Some jurisdictions will have several classification of CUPs (for example, minor and major) with different decision makers for each depending on the size and uniqueness of the use.

The authority to grant conditional use permits (CUPs) must be exercised in accordance with procedures and substantive criteria set by the local zoning ordinance. These criteria need not be detailed. Some ordinances simply authorize the administrative body to grant the application if it finds that the use will "promote the general welfare," a standard that is legally sufficient[1] and promotes the goal of flexibility by vesting broad discretion in the administrative body.[2] Most jurisdictions will require additional detailed findings such as that the project will enhance the surrounding neighborhood; that the project's location and characteristics will be compatible with adjacent properties, and that the project conforms with the purpose, intent, and provisions of the general plan. Even if the required finding is a general welfare standard, the grant of a CUP must be accompanied by written findings supported by substantial evidence.[3]

Although typically broad, the administrative body's discretionary authority to issue a permit is not unfettered. The proceedings must comply with the local ordinance, and the ordinance's substantive criteria must be observed.[4] Some local ordinances state that no permit that would violate the zoning ordinance's policies and objectives may be issued.[5] The issuing body may not act arbitrarily or capriciously,[6] and its decision must be supported by substantial evidence in the record. The applicant bears the burden of proof to establish that the project qualifies for a CUP.

CUPs must be consistent with any pertinent general plan elements, and there can be no consistency if the plan elements themselves are inadequate.[7] However, some courts

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[1] Hawkins v. County of Marin (1976) 54 Cal. App. 3d 586, 591–592, 126 Cal. Rptr. 754.

[2] Tustin Heights Assn. v. Bd. of Supervisors (1959) 170 Cal. App. 2d 619, 634–635, 339 P.2d 914.

[3] Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 515, 113 Cal. Rptr. 836, 522 P.2d 12; *see also* discussion of findings at § 60.33[3].

[4] Johnston v. Board of Supervisors (1947) 31 Cal. 2d 66, 76, 187 P.2d 686, *overruled on other grounds*, Bailey v. County of Los Angeles (1956) 46 Cal. 2d 132, 138–139, 293 P.2d 449; Stoddard v. Edelman (1970) 4 Cal. App. 3d 544, 548, 84 Cal. Rptr. 443.

[5] Upton v. Gray (1969) 269 Cal. App. 2d 352, 355, 74 Cal. Rptr. 783.

[6] *See, e.g.,* Van Sicklen v. Browne (1971) 15 Cal. App. 3d 122, 126, 92 Cal. Rptr. 786 (finding no arbitrary action).

[7] Neighborhood Action Group v. County of Calaveras (1984) 156 Cal. App. 3d 1176, 1184, 203 Cal. Rptr. 401.

have upheld the issuance of permits that were inconsistent with the applicable general plans so long as the permits complied with the applicable zoning ordinances.[8]

PRACTICE TIP: Consult Local Ordinance and Findings Requirements. In any case involving a conditional use permit, consult the local zoning ordinance for requirements, especially the findings to be made. Make sure the application materials include enough information to carry the applicant's burden of showing that the project qualifies under the local zoning ordinance criteria for a CUP and meets the required findings. Avoid generalized conclusions and include enough facts about the location, site, neighboring properties, and project characteristics to support the findings of fact, which must be supported by substantial evidence in the record.

[2] Term; Conditions

A CUP runs with the land and is not personal to the applicant.[9] Its term may be unlimited or may be established within the conditions of the grant.[10] For this reason, the CUP will be granted with a set of conditions designed to ensure that future operations will remain compatible with the area. All conditions run to subsequent owners or occupants and should therefore be broad enough to cover future operations.[11] Typically, the conditions are intended to lessen the use's negative impacts on the surrounding neighborhood.[12] Use permits may include expiration dates and require that the use be commenced within a certain time period.[13]

State law places certain limits on the condition allowed. Gov. Code § 65909 expressly prohibits two conditions: (1) the dedication of land not reasonably related to the conditional use; and (2) the posting of a bond for public improvements not reasonably related to the use. Unacceptable conditions must be judicially challenged by the applicant within a short limitations period and before commencing the approved

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[8] *See, e.g.,* Elysian Heights Residents Assn., Inc. v. City of Los Angeles (1986) 182 Cal. App. 3d 21, 30–31, 227 Cal. Rptr. 226; Hawkins v. County of Marin (1976) 54 Cal. App. 3d 586, 594, 126 Cal. Rptr. 754.

[9] Malibu Mountains Recreation, Inc. v. County of Los Angeles (1998) 67 Cal. App. 4th 359, 369–370, 79 Cal. Rptr. 2d 25.

[10] Edmonds v. County of Los Angeles (1953) 40 Cal. 2d 642, 645–650, 255 P.2d 772 (use to cease after three years).

[11] County of Imperial v. McDougal (1977) 19 Cal. 3d 505, 510, 138 Cal. Rptr. 472, 564 P.2d 14, *appeal dismissed*, 434 U.S. 944, 98 S. Ct. 469, 54 L. Ed. 2d 306.

[12] *See, e.g.,* County of Imperial v. McDougal (1977) 19 Cal. 3d 505, 511–512, 138 Cal. Rptr. 472, 564 P.2d 14, *appeal dismissed*, 434 U.S. 944, 98 S. Ct. 469, 54 L. Ed. 2d 306.

[13] *See, e.g.,* Upton v. Gray (1969) 269 Cal. App. 2d 352, 355, 74 Cal. Rptr. 783 (commencement date); Edmonds v. County of Los Angeles (1953) 40 Cal. 2d 642–645, 40 Cal. 2d 642, 255 P.2d 772 (expiration date); Metropolitan Outdoor Advertising Corp. v. City of Santa Ana (1994) 23 Cal. App. 4th 1401, 1403–1404, 28 Cal. Rptr. 2d 664 (permit may be issued for specific period of time).

use.[14] Otherwise the original applicant and successors may be estopped from challenging a condition if they have accepted the benefits of the permit.[15]

[3] Modification and Revocation; Vested Rights

A CUP may be modified if the permit's terms expressly allow modification or if the zoning ordinance allows modification to impose new or additional conditions to correct situations that would otherwise justify revocation.[16]

An unused permit may be revoked automatically by its own terms.[17] Lack of use may be defined in the permit or in the local zoning ordinance. Specified extensions or renewals may be granted on timely application and for good cause. However, when actual construction or use of a CUP is delayed by a lengthy government permit or approval process and the developer has in other ways demonstrated a good faith intention to proceed, a use permit renewal cannot be denied merely because construction has not commenced.[18] A permit may also be revoked for cause as specified in the local ordinance.[19] However, material expense incurred and substantial work performed in reliance on the CUP creates a vested right in its holder.[20] This right limits the government's power to modify or revoke the permit and heightens the showing of "good cause" necessary to revoke the permit.

When a use permit becomes vested, it may be revoked only if the permittee fails to comply with the terms or conditions in the permit or if there is a "compelling public necessity."[21] When a permittee acquires a vested right in a permit, the term "good cause" in an ordinance granting the right to revoke a permit for good cause will be

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[14] Gov. Code § 65009(c)(1)(E) (imposing statute of limitations of 90 days); *see* Travis v. County of Santa Cruz (2004) 33 Cal. 4th 757, 767, 16 Cal. Rptr. 3d 404, 94 P.3d 538 (action seeking removal of conditions imposed by ordinance on building permit was timely under Gov. Code § 65009(c)(1)(E) even though plaintiff raised facial rather than as-applied challenge to ordinance more than 90 days after ordinance was adopted, because action was brought within 90 days of final decision imposing conditions).

[15] County of Imperial v. McDougal (1977) 19 Cal. 3d 505, 510–511, 138 Cal. Rptr. 472, 564 P.2d 14, *appeal dismissed*, 434 U.S. 944, 98 S. Ct. 469, 54 L. Ed. 2d 306. *See* § 60.100 (scope of judicial review).

[16] Garavatti v. Fairfax Planning Com. (1971) 22 Cal. App. 3d 145, 148–149, 99 Cal. Rptr. 260.

[17] *See* O'Hagen v. Board of Zoning Adjustment (1971) 19 Cal. App. 3d 151, 158, 96 Cal. Rptr. 484 (permit may be revoked when permittee does nothing beyond obtaining permit).

[18] Community Development Comm'n of Mendocino County v. City of Fort Bragg (1988) 204 Cal. App. 3d 1124, 1129–1131, 251 Cal. Rptr. 709.

[19] *See, e.g.,* Garavatti v. Fairfax Planning Com. (1971) 22 Cal. App. 3d 145, 148, 99 Cal. Rptr. 260.

[20] O'Hagen v. Board of Zoning Adjustment (1971) 19 Cal. App. 3d 151, 158, 96 Cal. Rptr. 484; *see* Goat Hill Tavern v. City of Costa Mesa (1992) 6 Cal. App. 4th 1519, 1529, 8 Cal. Rptr. 2d 385 (owner of tavern operating under CUP had fundamental vested right in operation of business).

[21] Goat Hill Tavern v. City of Costa Mesa (1992) 6 Cal. App. 4th 1519, 1530, 8 Cal. Rptr. 2d 385; O'Hagen v. Board of Zoning Adjustment (1971) 19 Cal. App. 3d 151, 158, 161, 96 Cal. Rptr. 484; *see* Davidson v. County of San Diego (1996) 49 Cal. App. 4th 639, 649, 56 Cal. Rptr. 2d 617; Korean American Legal Advocacy Foundation v. City of Los Angeles (1994) 23 Cal. App. 4th 376, 391 n.5, 28 Cal. Rptr. 2d 530.

equated with "compelling public necessity."[22] Although the term "compelling public necessity" seems to indicate that any sufficiently strong public interest could form the basis for revoking a vested CUP, courts have tended to equate compelling public necessity to the need to abate a use that has become a public nuisance.[23] The "independent judgment" standard of review rather than the lesser "substantial evidence" test is applied to judicial review of a decision to revoke a CUP in which the permittee has a vested right.[24] For further discussion of vested rights, see § 60.82.

For additional coverage of conditional use permits, see CALIFORNIA REAL ESTATE LAW AND PRACTICE, Chapter 265, *Zoning Relief: Amendments, Conditional Use Permits, and Variances* (Matthew Bender).

PRACTICE TIP: Calendar Important Dates. Expiration dates and commencement of use requirements should be strictly calendared. Because time limits vary widely from jurisdiction to jurisdiction, both the permit terms and the local ordinance should be carefully checked. Most ordinances require commencement of the use within six months to two years or the CUP is void. In some cases, the terms of the CUP may require that the applicant file an application for a subsequent staff or board review to ensure compliance with all permit conditions after a certain number of years. In other cases, the applicant must apply for an extension or renewal before the expiration of the CUP term to avoid forfeiture. Make sure to calendar all deadlines regarding future compliance and extensions.

PRACTICE TIP: Document Use of CUP. Commencement of the use may mean actual use of the privileges of the CUP or preliminary construction activity if diligently pursued to completion. Abandonment of the use may be grounds for the permit's automatic termination. Abandonment is defined differently in various jurisdictions, and the local definition should be checked. A finding of abandonment may be avoided by conducting limited activities at the premises before full use of the permit.

Temporary closures or cessation of operations should be calendared according to the time limits of the local ordinance. Records should be kept in case needed to document to the local government that the use has commenced, is vested, and has

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[22] O'Hagen v. Board of Zoning Adjustment (1971) 19 Cal. App. 3d 151, 161, 96 Cal. Rptr. 484.

[23] Goat Hill Tavern v. City of Costa Mesa (1992) 6 Cal. App. 4th 1519, 1525, 8 Cal. Rptr. 2d 385; O'Hagen v. Board of Zoning Adjustment (1971) 19 Cal. App. 3d 151, 158–161, 96 Cal. Rptr. 484.

[24] Goat Hill Tavern v. City of Costa Mesa (1992) 6 Cal. App. 4th 1519, 1530–1531, 8 Cal. Rptr. 2d 385; Malibu Mountains Recreation, Inc. v. County of Los Angeles (1998) 67 Cal. App. 4th 359, 368, 79 Cal. Rptr. 2d 25.

not been abandoned.

§ 60.32 Variances

[1] Nature of and Power to Grant

Variances provide relief from the strict provisions of the zoning ordinance and allow a deviation from the development standards set by the zoning ordinance.[1] Essentially, variances are hardship exemptions from a zoning ordinance's terms.[2] A zoning ordinance is not required to include variance procedures, but variances serve as a safety mechanism to prevent a zoning ordinance from being declared unconstitutional as applied.[3]

The power to grant variances is strictly statutory,[4] and in counties and general law cities is governed by the criteria in Gov. Code § 65906.[5] In counties and general law cities, variances may provide relief from square footage, height, density, or setback requirements, but variances from the allowed use of the property are not permitted.[6] In contrast, some charter cities permit the issuance of variances from the use provisions of the zoning code. Parking variances allowing reductions in required parking under specific circumstances are also sanctioned by state law.[7]

[2] Criteria for Granting; Findings

While CUPs may be permitted on a broad finding of general welfare, the granting of a variance requires compliance with a strict set of findings. Gov. Code § 65906 sets the minimum criteria for granting a variance in a general law jurisdiction. The applicant must show that, due to special circumstances applicable to the property, including the parcel's size, shape, topography, location, or surroundings, strict application of the zoning ordinance would deprive the parcel of privileges enjoyed by identically zoned property in the vicinity.[8] Local ordinances may supplement these requirements with additional criteria that are consistent with the statute.[9] To protect against harsh local

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[1] Bringle v. Board of Supervisors (1960) 54 Cal. 2d 86, 88, 4 Cal. Rptr. 493, 351 P.2d 765.

[2] PMI Mortgage Ins. Co. v. City of Pacific Grove (1981) 128 Cal. App. 3d 724, 731, 179 Cal. Rptr. 185.

[3] *See, e.g.,* Bringle v. Board of Supervisors (1960) 54 Cal. 2d 86, 90, 4 Cal. Rptr. 493, 351 P.2d 765; Triangle Ranch, Inc. v. Union Oil Co. (1955) 135 Cal. App. 2d 428, 438, 287 P.2d 537.

[4] *See* Bernstein v. Smutz (1947) 83 Cal. App. 2d 108, 116–117, 188 P.2d 48.

[5] *See* § 60.32[2] for discussion of Gov. Code § 65906 and the criteria for granting a variance.

[6] Gov. Code § 65906; Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 511 n.5, 113 Cal. Rptr. 836, 522 P.2d 12.

[7] Gov. Code § 65906.5.

[8] Gov. Code § 65906. "Special circumstances" may include requirements imposed by applicable regulations. *See* Craik v. County of Santa Cruz (2000) 81 Cal. App. 4th 880, 890, 96 Cal. Rptr. 2d 538 (requirements imposed by Federal Emergency Management Agency and related county regulations constituted special circumstances warranting a variance).

[9] Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 511–512 n.6, 518–519 n.18, 113 Cal. Rptr. 836, 522 P.2d 12.

requirements that may restrict the ability to obtain variances or other approvals, state law also provides special rules regarding approvals for mobile homes,[10] group homes,[11] accessory dwelling units,[12] and historic structures.[13]

State law requires that each grant of a variance be based on three distinct showings:[14]

- That there are unique physical constraints on the property;
- That deprivation or "hardship" would result without relief; and
- That there are disparities between the applicant's parcel and neighboring land.

The criteria contemplate that the number of parcels qualifying for a variance will be limited, and that only a small portion of a zoned area will qualify for a variance.[15] If the disadvantage is common, rather than unique, then the reasonableness of the entire zone's classification is dubious, and rezoning is the appropriate remedy.[16]

Certain factors have been found inappropriate for the basis of a variance. Mere economic hardship is generally an insufficient foundation for a variance.[17] To be relevant at all, economic hardship must pertain to the land in question, not the applicant's financial situation.[18] A self-induced hardship, such as selling part of a parcel so that the remainder cannot be developed lawfully, does not justify a variance.[19] Criteria such as the desirability of a proposal, its attractive design, or the potential community benefits are legally irrelevant.[20] These general welfare factors, which might be persuasive in a conditional use permit application, have no bearing on the central variance issue of relieving individual hardship and providing flexibility for unique physical situations.

For further discussion and a sample "Resolution Granting Variance," see CALIFORNIA LEGAL FORMS, Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits*, § 30B.201 (Matthew Bender).

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[10] Health & Safety Code § 18300.1 (CUP may be required.)

[11] Welf. & Inst. Code § 5116 (no variance or CUP may be required).

[12] Gov. Code § 65852.1. Gov. Code § 65852.1 became inoperative on January 1, 2007. However, any zoning variance, special use permit, or conditional use permit issued for a dwelling unit before January 1, 2007, pursuant to § 65852.1 remains valid, and a dwelling unit constructed pursuant to such a zoning variance, special use permit, or conditional use permit must be considered in compliance with all relevant laws, ordinances, rules, and regulations after January 1, 2007. Gov. Code § 65852.1(b).

[13] Health & Safety Code § 18961.

[14] Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 521, 113 Cal. Rptr. 836, 522 P.2d 12.

[15] Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 520, 113 Cal. Rptr. 836, 522 P.2d 12.

[16] Zakessian v. City of Sausalito (1972) 28 Cal. App. 3d 794, 799, 105 Cal. Rptr. 105.

[17] Broadway, Laguna Etc. Assn. v. Board of Permit Appeals of City and County of San Francisco (1967) 66 Cal. 2d 767, 774–775, 59 Cal. Rptr. 146, 427 P.2d 810.

[18] Broadway, Laguna Etc. Assn. v. Board of Permit Appeals of City and County of San Francisco (1967) 66 Cal. 2d 767, 781, 59 Cal. Rptr. 146, 427 P.2d 810.

[19] Town of Atherton v. Templeton (1961) 198 Cal. App. 2d 146, 154, 17 Cal. Rptr. 680.

[20] Orinda Assn. v. Board of Supervisors (1986) 182 Cal. App. 3d 1145, 1166, 227 Cal. Rptr. 688.

[3] Conditions; Term; Transferability

Like a CUP, a variance may be conditioned to ensure that, in eliminating a hardship, the parcel is not being granted special privileges. Conditions must be reasonable[21] and must further the zoning ordinance's objectives.[22] Variances may be of limited duration and may expire if not utilized. The prohibition of Gov. Code § 65909 on conditions requiring dedications or infrastructure bonds unrelated to use permits applies equally to variance conditions. Variances run with the land and are not extinguished upon a change of ownership.[23]

For additional discussion of variances, see CALIFORNIA REAL ESTATE LAW AND PRACTICE, Chapter 265, *Zoning Relief: Amendments, Conditional Use Permits, and Variances* (Matthew Bender), and CALIFORNIA LEGAL FORMS, Chapter 30B, *Zoning, Building, and Environmental Entitlements and Permits*, §§ 30B.200, 30B.201 (Matthew Bender).

§ 60.33 Administrative Procedure

[1] Due Process Requirements; Notice and Opportunity to Be Heard

Within certain constraints, each jurisdiction adopts its own administrative procedures in its zoning ordinance for conditional use permits and variances.[1] Because these are quasi-judicial acts involving the application of general standards to specific parcels of real property, the procedures must comport with constitutional due process requirements.[2]

This means that the procedures must provide reasonable notice and an opportunity to be heard to those who will be deprived of a significant property interest by the action.[3] The requirements for due process were discussed by the California Supreme Court in *Horn v. County of Ventura*.[4] The Court ruled that notice must be "reasonably calculated to afford affected persons the realistic opportunity to protect their interests."[5] Sufficiency of notice depends on the magnitude of a project and the degree to which a landowner's interests are affected.[6] No specific formula dictates the nature, content, and

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[21] *See* Bringle v. Board of Supervisors (1960) 54 Cal. 2d 86, 88–89, 4 Cal. Rptr. 493, 351 P.2d 765.

[22] City of Santa Clara v. Paris (1977) 76 Cal. App. 3d 338, 341, 142 Cal. Rptr. 818.

[23] Cohn v. County Bd. of Sup'rs of Los Angeles County (1955) 135 Cal. App. 2d 180, 184, 286 P.2d 836; *see also* Anza Parking Corp. v. City of Burlingame (1987) 195 Cal. App. 3d 855, 858–860, 241 Cal. Rptr. 175, citing *Cohn v. County Bd. of Sup'rs of Los Angeles County*.

[1] Gov. Code §§ 65804, 65901, 65903.

[2] Horn v. County of Ventura (1979) 24 Cal. 3d 605, 612–614, 156 Cal. Rptr. 718, 596 P.2d 1134; Hayssen v. Board of Zoning Adjustments of Sonoma (1985) 171 Cal. App. 3d 400, 404, 217 Cal. Rptr. 464, *cert. denied*, 476 U.S. 1114, 106 S. Ct. 1969, 90 L. Ed. 2d 653; Trans-Oceanic Oil Corp. v. Santa Barbara (1948) 85 Cal. App. 2d 776, 795–797, 194 P.2d 148.

[3] Horn v. County of Ventura (1979) 24 Cal. 3d 605, 612, 156 Cal. Rptr. 718, 596 P.2d 1134.

[4] Horn v. County of Ventura (1979) 24 Cal. 3d 605, 156 Cal. Rptr. 718, 596 P.2d 1134.

[5] Horn v. County of Ventura (1979) 24 Cal. 3d 605, 617, 156 Cal. Rptr. 718, 596 P.2d 1134.

[6] Horn v. County of Ventura (1979) 24 Cal. 3d 605, 618, 156 Cal. Rptr. 718, 596 P.2d 1134. *But see* Taxpayers for Accountable School Bond Spending v. San Diego Unified School District 215 Cal. App. 4th 1013, 1058, 156 Cal. Rptr. 3d 449 (new stadium lighting was not anticipated to so substantially affect the

timing of the constitutionally required notice, but it must occur long enough before a final decision to allow for a meaningful pre-deprivation hearing.[7] An adequate hearing must give the affected landowner an opportunity to raise specific objections to the action.[8]

State law prescribes a particular form of notice,[9] and mandates a full public hearing[10] for all applications for conditional use permits and variances, all actions to modify or revoke them, and all administrative appeals of these decisions.[11] The local ordinance may expressly carve out a limited exception to the public hearing requirement for certain types of minor variances as determined by ordinance.[12] Finally, Gov. Code § 65804 requires all localities to publish their rules, any planning staff reports, and a hearing record on prior written request.

[2] Fair Hearing and Bias

Local law determines which administrative body hears applications and appeals. A general law jurisdiction may appoint a board of zoning adjustment or a zoning administrator to hear and decide applications.[13] Otherwise, the planning commission handles applications.[14] Hearings are often informal, and relaxed rules of evidence apply.[15] Although the elements of a fair and impartial hearing must be retained,[16] it is not necessary that testimony be given under oath, and the rights of discovery and cross-examination do not apply.[17]

However, a fair hearing also includes the right to a decisionmaker free from personal bias who is committed to making a decision based solely on the evidence presented at the hearing. Although the standard of impartiality required at an administrative hearing is less than that required at a judicial proceeding,[18] actual bias may be reviewed on a case by case basis. While courts have allowed decisionmakers, especially elected officials, leeway to acquire information outside the hearing room and discuss local

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use of neighboring property that it could constitute a significant deprivation of a property interest requiring notice).

[7] Horn v. County of Ventura (1979) 24 Cal. 3d 605, 618, 156 Cal. Rptr. 718, 596 P.2d 1134.

[8] Horn v. County of Ventura (1979) 24 Cal. 3d 605, 619, 156 Cal. Rptr. 718, 596 P.2d 1134.

[9] Gov. Code § 65905(b) requires publication of notice in accordance with Gov. Code § 65091.

[10] Gov. Code § 65905(a).

[11] Gov. Code § 65905(a).

[12] Gov. Code § 65901(b).

[13] Gov. Code §§ 65900, 65901(a).

[14] Gov. Code § 65902.

[15] Gov. Code § 65010.

[16] Clark v. City of Hermosa Beach (1996) 48 Cal. App. 4th 1152, 1170–1172, 56 Cal. Rptr. 2d 223, *cert. denied*, 520 U.S. 1167, 117 S. Ct. 1430, 137 L. Ed. 2d 538.

[17] Mohilef v. Janovici (1996) 51 Cal. App. 4th 267, 288–302, 58 Cal. Rptr. 2d 721.

[18] Gai v. City of Selma (1998) 68 Cal. App. 4th 213, 219, 79 Cal. Rptr. 2d 910.

issues with constituents,[19] an applicant in a quasi-judicial proceeding is entitled to decisionmakers free from actual bias. Many jurisdictions have specific procedures and rules regarding "ex parte" contacts with decisionmakers to prevent the decisionmaker from acquiring evidence outside the hearing, or to require discloser of any such contacts.

In a conditional use case involving the keeping of up to five tigers in a residential area, a claim of bias was rejected on the grounds that the decisionmakers' contacts with project opponents were the ordinary type of contacts that elected officials have with their constituents, and there was no evidence of personal bias.[20] However, where a city council heard an appeal of a conditional use permit for a gas station, the decision was overturned on the basis of bias where one city council member participated in overt advocacy for the opposition and was no longer "a neutral, unbiased decisionmaker."[21]

[3] Need for Findings

The landmark case of *Topanga Asso. for Scenic Community v. County of Los Angeles*[22] established that a decision on an application for a quasi-judicial zoning action must be accompanied by written findings, supported by substantial evidence in the record, that satisfy the criteria of the local zoning ordinance and, if applicable, Gov. Code § 65906.[23] Although they need not be as formal as judicial findings, the findings must bridge the analytic gap between the raw evidence and the ultimate decision.[24] The findings must be sufficient to enable the parties to determine on what basis they should seek review in court, and, in the event of a legal action, to apprise the court of the basis for the local jurisdiction's decision.

PRACTICE TIP: Focus on the Importance of Findings. It is extremely important to be familiar with the local ordinance and the findings it requires for a conditional use permit or a variance. Evidence to support each of the findings should be presented in the application or at the hearing. It is advisable to prepare your own proposed findings detailing the analytical path from your evidence to the

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[19] *See* City of Fairfield v. Superior Court (1975) 14 Cal. 3d 768, 780, 122 Cal. Rptr. 543; Todd v. City of Visalia (1967) 254 Cal. App. 2d 679, 691, 62 Cal. Rptr. 485.

[20] Hauser v. Ventura County Board of Supervisors (2018), 20 Cal. App. 5th 572, 580, 229 Cal. Rptr. 3d 159.

[21] Petrovich Development Co., LLC, v. City of Sacramento, (2020) 48 Cal. App. 5th 963, 972, 976, 262 Cal. Rptr. 3d 331, 341.

[22] Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 515, 113 Cal. Rptr. 836, 522 P.2d 12.

[23] Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 511–514, 113 Cal. Rptr. 836, 522 P.2d 12 (variances); Jacobson v. County of Los Angeles (1977) 69 Cal. App. 3d 374, 391, 137 Cal. Rptr. 909 (conditional use permits).

[24] Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 515, 113 Cal. Rptr. 836, 522 P.2d 12.

required conclusions for submission to the decision-maker. Similarly, staff should be aware of the importance of detailed findings to support every decision.

[4] Effect of Decisions

Administrative decisions regarding variance and conditional use permit (CUP) applications have no res judicata effect.[25] However, while a previous denial of a CUP or variance is no bar to a subsequent grant, a showing of "changed conditions and circumstances" may be necessary.[26] Conversely, the fact that a similarly situated applicant received his or her variance or use permit is legally irrelevant. Each application is unique.[27]

§ 60.34 Administrative Appeal

The local zoning ordinance sets procedures and designates a tribunal for administrative appeals of variance and conditional use permit decisions.[1] General law jurisdictions are authorized to create a board of appeals.[2] If they do not establish a board, the local legislative body hears administrative appeals.[3] The reviewing body may affirm, reverse, modify, or set aside any decision below.[4]

Administrative review is de novo, and the reviewing body is not limited to the record below.[5] The applicable law is the zoning ordinance in effect at the time of appeal.[6] Standing to appeal is not restricted to the applicant; any interested or aggrieved party may appeal.[7]

For additional discussion and a Notice of Appeal from Action of Planning Commission (City and County of San Francisco form), see CALIFORNIA LEGAL FORMS, Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits*, § 30B.202 (Matthew Bender).

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[25] Steiger v. Board of Supervisors of Los Angeles County (1956) 143 Cal. App. 2d 352, 358, 300 P.2d 210 (doctrine of res judicata requires a judgment rendered by a court of competent jurisdiction).

[26] Steiger v. Board of Supervisors of Los Angeles County (1956) 143 Cal. App. 2d 352, 358, 300 P.2d 210.

[27] Hill v. City of Manhattan Beach (1971) 6 Cal. 3d 279, 286–287, 98 Cal. Rptr. 785, 491 P.2d 369; Minney v. City of Azusa (1958) 164 Cal. App. 2d 12, 32–33, 330 P.2d 255, *appeal dismissed*, 359 U.S. 436, 79 S. Ct. 941, 3 L. Ed. 2d 932 (1959).

[1] Gov. Code §§ 65804, 65903.

[2] Gov. Code § 65903.

[3] Gov. Code § 65904.

[4] Gov. Code §§ 65903, 65904; Cow Hollow Improvement Club v. DiBene (1966) 245 Cal. App. 2d 160, 169, 53 Cal. Rptr. 610.

[5] Clark v. City of Hermosa Beach (1996) 48 Cal. App. 4th 1152, 1170–1172, 56 Cal. Rptr. 2d 223, *cert. denied*, 520 U.S. 1167, 117 S. Ct. 1430, 137 L. Ed. 2d 538.

[6] Russian Hill Improv. Asso. v. Board of Permit Appeals (1967) 66 Cal. 2d 34, 38–40, 56 Cal. Rptr. 672, 423 P.2d 824.

[7] Concerned Citizens of Murphys v. Jackson (1977) 72 Cal. App. 3d 1021, 1026–1027, 140 Cal. Rptr. 531.

§§ 60.35–60.39 [Reserved]

4. Nonconforming Uses

§ 60.40 Definition and Limitations

[1] Definition

A legal nonconforming use is one that was lawful when established, but due to a subsequently enacted zoning restrictions no longer complies with the zoning ordinance.[1] The term nonconforming use includes nonconforming activities on vacant land, nonconforming uses within buildings, as well as the existence of nonconforming buildings themselves.[2] A legal nonconforming use, like a variance or a use permit, is a form of exception from the strict application of the adopted zoning ordinance.

[2] Limitations

Local zoning ordinances always include some method of acknowledging legal nonconforming uses but generally subject them to a variety of legal limitations intended to ensure their eventual termination. This approach strikes a balance between competing interests: the public benefits derived from uniform zoning[3] and the protection of vested property interests.[4] An ordinance that does not accommodate existing legal nonconforming uses would be subject to constitutional challenge as a denial of a vested right or a taking.[5] However, because zoning ordinances aim to establish uniform regulations and uses within each zone, there is a strong interest in ensuring that nonconforming uses do not expand or continue in existence indefinitely.[6] An ordinance therefore may properly include regulations designed to limit and

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[1] Hill v. City of Manhattan Beach (1971) 6 Cal. 3d 279, 285, 98 Cal. Rptr. 785, 491 P.2d 369; City of Los Angeles v. Gage (1954) 127 Cal. App. 2d 442, 453, 274 P.2d 34.

[2] *See, e.g.,* McCaslin v. City of Monterey Park (1958) 163 Cal. App. 2d 339, 343–344, 329 P.2d 522 (nonconforming quarry on raw land); City of Los Angeles v. Gage (1954) 127 Cal. App. 2d 442, 447, 274 P.2d 34 (nonconforming business in residence); Melton v. City of San Pablo (1967) 252 Cal. App. 2d 794, 804–805, 61 Cal. Rptr. 29 (parked bus used as restaurant in commercial zone would have been legal, nonconforming use but for certain violations of City's building codes); O'Mara v. Council of the City of Newark (1965) 238 Cal. App. 2d 836, 837, 48 Cal. Rptr. 208 (residential building in retail zone).

[3] City of Los Angeles v. Gage (1954) 127 Cal. App. 2d 442, 459, 274 P.2d 34.

[4] *See* Jones v. City of Los Angeles (1930) 211 Cal. 304, 314, 295 P. 14.

[5] *See* County of San Diego v. McClurken (1951) 37 Cal. 2d 683, 686, 234 P.2d 972 (it is "doubtful" that a zoning ordinance compelling immediate cessation of nonconforming uses would be constitutional); Jones v. City of Los Angeles (1930) 211 Cal. 304, 310–311, 295 P. 14 (ordinance that destroyed existing nonconforming use would be a dangerous innovation of doubtful constitutionality).

[6] Point San Pedro Road Coalition v. County of Marin (2019) 33 Cal. App. 5th 1074, 1080, 245 Cal. Rptr. 3d 580; Hansen Brothers Enterprises, Inc. v. Board of Supervisors (1996) 12 Cal. 4th 533, 560, 48 Cal. Rptr. 2d 778, 907 P.2d 1324; County of San Diego v. McClurken (1951) 37 Cal. 2d 683, 686–687, 234 P. 2d 972; Dienelt v. County of Monterey (1952) 113 Cal. App. 2d 128, 131, 247 P.2d 925.

eventually terminate nonconforming uses.[7] Provisions permitting nonconforming uses are strictly construed to limit their application whenever possible.[8]

§ 60.41 Establishing Nonconforming Rights

An owner is entitled to continue only a lawful nonconforming use that actually existed at the time the new zoning restriction was adopted.[1] In all instances, the burden of proof is on the party claiming the right.[2] Nonconforming rights do not protect a use for which the owner has only unrealized plans,[3] even if the contemplated use was an express motive for the purchase of the property.[4] Mere preparations for a use subsequently rendered nonconforming do not establish an actual use, unless such preparatory work is sufficient to create a vested right.[5]

The nonconforming use must also have been legally established and lawfully conducted. For example, violation of local plumbing, building, and electrical codes has been held to render a use unlawful and defeat a claim to a legal nonconforming use.[6]

Finally, the use must have been initiated before the effective date of the new zoning restriction. This date is typically the ordinance's effective date or its date of adoption.[7] However, a zoning ordinance may provide a specific date for nonconforming rights to be established, and such a provision would control.

PRACTICE TIP: Documenting a Nonconforming Use. The key to establishing the right to a nonconforming use is often a factual showing of exactly when and

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[7] County of San Diego v. McClurken (1951) 37 Cal. 2d 683, 686, 234 P. 2d 972; City of Los Angeles v. Gage (1954) 127 Cal. App. 2d 442, 459, 274 P. 2d 34.

[8] County of San Diego v. McClurken (1951) 37 Cal. 2d 683, 687, 234 P. 2d 972; County of Orange v. Goldring (1953) 121 Cal. App. 2d 442, 447, 263 P. 2d 321.

[1] Hill v. City of Manhattan Beach (1971) 6 Cal. 3d 279, 285, 98 Cal. Rptr. 785, 491 P. 2d 369.

[2] Melton v. City of San Pablo (1967) 252 Cal. App. 2d 794, 804, 61 Cal. Rptr. 29.

[3] County of San Diego v. McClurken (1951) 37 Cal. 2d 683, 690, 234 P.2d 972; Spindler Realty Corp. v. Monning (1966) 243 Cal. App. 2d 255, 270, 53 Cal. Rptr. 7, *cert. denied*, 385 U.S. 975, 87 S. Ct. 515, 17 L. Ed. 2d 437.

[4] Anderson v. City Council of Pleasant Hill (1964) 229 Cal. App. 2d 79, 81, 88, 40 Cal. Rptr. 41; Christian Service Soc. v. County of Butte (1958) 161 Cal. App. 2d 280, 282, 326 P.2d 532.

[5] *See, e.g.,* Spindler Realty Corp. v. Monning (1966) 243 Cal. App. 2d 255, 264–265, 53 Cal. Rptr. 7, *cert. denied*, 385 U.S. 975, 87 S. Ct. 515, 17 L. Ed. 2d 437 (grading by permit and completion of engineering and architectural plans insufficient to vest right); Griffin v. County of Marin (1958) 157 Cal. App. 2d 507, 513, 321 P.2d 148 (building permit and expenses incurred thereunder established vested right). For a discussion of vested rights, see § 60.82.

[6] Melton v. City of San Pablo (1967) 252 Cal. App. 2d 794, 805, 61 Cal. Rptr. 29; Mang v. County of Santa Barbara (1960) 182 Cal. App. 2d 93, 100, 5 Cal. Rptr. 724.

[7] *See, e.g.,* Hill v. City of Manhattan Beach (1971) 6 Cal. 3d 279, 285, 98 Cal. Rptr. 785, 491 P.2d 369; Spindler Realty Corp. v. Monning (1966) 243 Cal. App. 2d 255, 270, 53 Cal. Rptr. 7, *cert. denied*, 385 U.S. 975, 87 S. Ct. 515, 17 L. Ed. 2d 437 (effective date); County of San Diego v. McClurken (1951) 37 Cal. 2d 683, 686, 234 P.2d 972 (date of adoption).

how the use was established and what the use historically has included. Thus, careful research of both the applicable regulations at the time the use was established and the historical use of the property is important. Any evidence which will convince the local jurisdiction that the use was lawfully established and was not expanded can be used, including company records, the recollections of past employees, and reporting or advertising in local newspapers of past uses on the property, thereby establishing how long the nonconforming use has been in existence.

§ 60.42 Limitations on Nonconforming Rights

[1] Changes in Use and Expansion

The right to continue a specific existing nonconforming use extends to any substantially similar use.[1] On the other hand, because the concept of a nonconforming use is contrary to zoning's fundamental goal of uniformity, local ordinances may properly ban changes that expand a use, make it more permanent, or substantially change the use.[2]

In determining whether a nonconforming use has retained its original character, each case is decided on its own facts.[3] Disputed changes generally fall into three categories:

- Engaging in different or more intensive activities on the site;
- Altering the structure; or
- Moving the use or expanding its physical size.

These three types of changes are discussed in § 60.42[2]–[4], *below*.

[2] Different Activities; Intensification

Engaging in new activities often impermissibly changes or intensifies a nonconforming use. An entirely new use will not qualify as an existing nonconforming use. Generally, changes to a "similar" use are permitted, while changes that are dissimilar or tend to intensify, enlarge, or make a use more permanent are prohibited. However, the comparison of old and new uses is fact-specific and must be examined on a case-by-case basis. For example, an owner was not allowed to use an industrial building in a residential zone to manufacture and sell boats and trailers when the prior nonconforming use was to bottle wine.[4] Offering a full line of alcoholic beverages in a nonconforming restaurant previously serving only beer and wine has been held to

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[1] Edmonds v. County of Los Angeles (1953) 40 Cal. 2d 642, 651, 255 P.2d 772.

[2] Sabek, Inc. v. County of Sonoma (1987) 190 Cal. App. 3d 163, 167–168, 235 Cal. Rptr. 350; City of Los Altos v. Silvey (1962) 206 Cal. App. 2d 606, 609, 24 Cal. Rptr. 200; Paramount Rock Co. v. County of San Diego (1960) 180 Cal. App. 2d 217, 228–229, 4 Cal. Rptr. 317.

[3] Edmonds v. County of Los Angeles (1953) 40 Cal. 2d 642, 651, 255 P.2d 772.

[4] City of Los Altos v. Silvey (1962) 206 Cal. App. 2d 606, 610–611, 24 Cal. Rptr. 200; *see also* Paramount Rock Co. v. County of San Diego (1960) 180 Cal. App. 2d 217, 229–230, 4 Cal. Rptr. 317.

improperly expand the use.[5] Courts also generally disallow any expansion or intensification of existing activities.[6] However, the modernization of a manufacturing process for a similar use (manufacturing laminated sheets rather than the former tile and ceramics) has been held not to constitute a change in use.[7]

On the other hand, a change from a neighborhood theater to an adult entertainment theater was found to be an impermissible change.[8] Similarly, where the local ordinance specifically disallowed "intensification" of a nonconforming use, the addition of processing recycled asphalt products at an existing quarry permitted for on-site asphalt material production was not allowed.[9]

[3] Structural Alterations

Structural alterations that would expand a nonconforming use, make it more permanent, or create a new use may be prohibited.[10] However, local ordinances usually permit reasonable repairs and maintenance that preserve the owner's right to continue the nonconforming use.[11] Reasonable repairs may be limited to an annual percentage of appraised value to ensure that repairs do not constitute substantial alterations. Maintenance may permissibly prolong a structure's useful life, but the owner cannot rely on repairs to defeat a zoning ordinance's goal of eventually eliminating nonconforming uses.[12]

Many local ordinances exempt repairs required by law or building code to encourage the elimination of hazardous conditions without forfeiting legal nonconforming status.[13] For example, repairs necessitated by fire or other catastrophic event may be allowed. It has been held that structural alterations mandated by law for a slaughterhouse were justified as necessary to preserve the owner's original right to engage in the

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[5] Town of Los Gatos v. State Bd. of Equal. (1956) 141 Cal. App. 2d 344, 349, 296 P.2d 909.

[6] *See, e.g.,* Edmonds v. County of Los Angeles (1953) 40 Cal. 2d 642, 651–652, 255 P.2d 772 (enlarging trailer court capacity from 20 to 50); County of Orange v. Goldring (1953) 121 Cal. App. 2d 442, 446, 263 P.2d 321 (expanding cattle feeding pen capacity from 200 to 3,600).

[7] Endara v. City of Culver City (1956) 140 Cal. App. 2d 33, 38, 294 P.2d 1003.

[8] Walnut Properties, Inc. v. City Council (1980) 100 Cal. App. 3d 1018, 1024, 161 Cal. Rptr. 411, *cert. denied*, 449 U.S. 836, 101 S. Ct. 109, 66 L. Ed. 2d 42.

[9] Point San Pedro Road Coalition v. County of Marin (2019) 33 Cal. App. 5th 1074, 245 Cal. Rptr. 3d 580.

[10] Ricciardi v. County of Los Angeles (1953) 115 Cal. App. 2d 569, 575–576, 252 P.2d 773; Dienelt v. County of Monterey (1952) 113 Cal. App. 2d 128, 130–131, 247 P.2d 925 (replacing flagstone patio and larger concrete patio extended use); Hopkins v. MacCulloch (1939) 35 Cal. App. 2d 442, 452, 95 P.2d 950 (remodeling grocery and lunchroom was structural alteration).

[11] Ricciardi v. County of Los Angeles (1953) 115 Cal. App. 2d 569, 576–577, 252 P.2d 773; *see* County of San Diego v. McClurken (1951) 37 Cal. 2d 683, 689, 234 P.2d 972 (implying that reasonable repairs must be allowed regardless of regulation's provisions).

[12] National Advertising Co. v. County of Monterey (1970) 1 Cal. 3d 875, 880, 83 Cal. Rptr. 577, 464 P.2d 33, *cert. denied*, 398 U.S. 946, 90 S. Ct. 1869, 26 L. Ed. 2d 286.

[13] *See, e.g.,* City of La Mesa v. Tweed & Gambrell Mill (1956) 146 Cal. App. 2d 762, 773, 304 P.2d 803 (ordinance provides exception for alterations required by law).

nonconforming use.[14] Another court allowed a dairy owner to reconstruct fences and make other improvements required by the health department.[15]

[4] Relocating or Expanding

Local zoning ordinances typically prohibit nonconforming uses from shifting location or expanding in physical size, and courts routinely uphold these provisions.[16] The exceptions to this rule are uses that are by their nature consumptive of land; such uses must expand their physical boundaries to continue, and expansion is therefore part of the original right. Thus, a quarry was allowed to excavate previously untouched portions of the parcel, despite an explicit provision in the zoning ordinance prohibiting expansion of nonconforming uses.[17] Similarly, when dredging a settling pond was an essential part of nonconforming operations, a waste site for dredged material could be expanded.[18] In these exceptional cases, however, the use may not be expanded beyond the original parcel.[19]

PRACTICE TIP: Local Requirements for Nonconforming Uses. Carefully study your local zoning code regarding nonconforming uses. Local ordinances may include detailed and specific guidance on what types of changes to existing nonconforming uses are permitted. Some ordinances include specific time limits for the continuance of specific nonconforming uses or specific percentage increases in size of the use which are allowed. Other ordinances will permit changes or expansions only with a new discretionary review such as a plan approval or CUP.

§ 60.43 Terminating the Nonconforming Use

[1] Destruction

Under many local ordinances, if fire or other catastrophic causes destroy a certain percentage of a building's value, the owner may not rebuild and resume a nonconforming use. As long as the percentage figure is not unreasonable or confiscatory, such provisions are valid. Seventy-five percent of value is a commonly used and upheld

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[14] Ricciardi v. County of Los Angeles (1953) 115 Cal. App. 2d 569, 577–578, 252 P.2d 773.

[15] City of Fontana v. Atkinson (1963) 212 Cal. App. 2d 499, 507, 28 Cal. Rptr. 25.

[16] *See, e.g.,* City of Fontana v. Atkinson (1963) 212 Cal. App. 2d 499, 507, 28 Cal. Rptr. 25 (improper enclosure of additional land for nonconforming dairy); Rehfeld v. San Francisco (1933) 218 Cal. 83, 85, 21 P.2d 419 (improper expansion of nonconforming grocery onto adjacent vacant lot); City of Yuba City v. Cherniavsky (1931) 117 Cal. App. 568, 573, 4 P.2d 299 (improper relocation of nonconforming grocery to new, larger quarters on same lot).

[17] McCaslin v. City of Monterey Park (1958) 163 Cal. App. 2d 339, 349, 329 P.2d 522.

[18] Halaco Engineering Co. v. South Central Coast Regional Com. (1986) 42 Cal. 3d 52, 70, 73–74, 227 Cal. Rptr. 667, 720 P.2d 15.

[19] McCaslin v. City of Monterey Park (1958) 163 Cal. App. 2d 339, 350, 329 P.2d 522.

standard.[1] To partially compensate an owner for such termination by destruction, specific property tax relief is available for owners of destroyed property which cannot be rebuilt because of zoning prohibitions.[2] State law provides that a local jurisdiction must adopt a nonconforming use ordinance providing for the rebuilding of multi-family dwellings damaged by catastrophic causes before the jurisdiction may down zone a multi-family residential area in a way that renders existing multi-family uses nonconforming.[3]

[2] Discontinuance

Voluntary discontinuance can terminate the right to a nonconforming use.[4] Local ordinances frequently prescribe the time period of nonuse that will terminate the right, usually in the range of six months to one year.[5] Proof of an intent to abandon the use is probably unnecessary,[6] and discontinuance may terminate the right even when the zoning ordinance does not include a provision to this effect.[7] Discontinuance must, however, be a voluntary act of relinquishment. For example, suspending dairy operations to make repairs required by law was held not to terminate a valid nonconforming use.[8]

[3] Nuisance Abatement

On a proper showing of public nuisance, a nonconforming use can be immediately terminated, provided that procedural due process is followed.[9] The local ordinance may provide a procedure for such nuisance abatement and may properly authorize the local planning body to determine whether a nonconforming use is a nuisance.[10] The entire use should not be abated if a lesser remedy such as the imposition of conditions will prevent the nuisance.[11]

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[1] *See* O'Mara v. Council of the City of Newark (1965) 238 Cal. App. 2d 836, 840, 48 Cal. Rptr. 208 (rule eliminating nonconforming right if 75 percent of value destroyed was valid).

[2] Gov. Code § 43007.

[3] Gov. Code § 65863.4(a).

[4] City of Los Angeles v. Wolfe (1971) 6 Cal. 3d 326, 337, 99 Cal. Rptr. 21, 491 P.2d 813; *see* Stokes v. Board of Permit Appeals (1997) 52 Cal. App. 4th 1348, 1354, 61 Cal. Rptr. 2d 181 (evidence showing that building had been vacant and its use as a bathhouse discontinued for at least seven years when the plaintiff bought it established an intentional decision to abandon the premises and a discontinued use as a matter of law).

[5] *See, e.g.,* Hill v. City of Manhattan Beach (1971) 6 Cal. 3d 279, 286 n.4, 98 Cal. Rptr. 785, 491 P.2d 369.

[6] League to Save Lake Tahoe v. Crystal Enterprises (9th Cir. 1982) 685 F.2d 1142, 1146.

[7] Burke v. City of Los Angeles (1945) 68 Cal. App. 2d 189, 191, 156 P.2d 28.

[8] City of Fontana v. Atkinson (1963) 212 Cal. App. 2d 499, 507, 28 Cal. Rptr. 25; *but see* Stokes v. Board of Permit Appeals (1997) 52 Cal. App. 4th 1348, 1356, 61 Cal. Rptr. 2d 181 (fact that discontinuance of use as bathhouse was under threat of city order and therefore not voluntary did not preclude finding of abandonment).

[9] McCaslin v. City of Monterey Park (1958) 163 Cal. App. 2d 339, 347, 329 P.2d 522; Leppo v. City of Petaluma (1971) 20 Cal. App. 3d 711, 717–718, 97 Cal. Rptr. 840.

[10] Livingston Rock etc. Co. v. County of L.A. (1954) 43 Cal. 2d 121, 128, 272 P.2d 4.

[11] Morton v. Superior Court (1954) 124 Cal. App. 2d 577, 582, 269 P.2d 81.

[4] Amortization

Another method of terminating a nonconforming use is amortization. An amortization period for the nonconforming use's continuation is provided commensurate with the investment and the nature of the use involved.[12] The critical factor in determining an amortization scheme's validity is the reasonableness of the grace period. If the amortization period is reasonable, this method of termination is constitutional[13] and is an equitable means of reconciling the public interest in uniform zoning with the private burden of lost investment.[14] On the other hand, an unreasonably short amortization period is a deprivation of property without due process or just compensation.[15]

The reasonableness of an amortization period as applied to a specific property is a factual issue to be resolved on a case-by-case basis.[16] The owner bears the burden of proving the amortization period unreasonable.[17] A ruling that a particular period is unreasonable for a particular nonconforming use does not preclude its application to another property or use, nor does it invalidate the ordinance as a whole.[18]

The reasonableness of an amortization period has been evaluated by various criteria. One test focuses on the following factors:[19]

- The extent of incongruity between the use and other nearby development;
- The restriction's severity, measured by both prohibited and remaining uses;
- Compliance costs such as moving expenses; and
- Adequacy of notice to the user.

Other relevant factors include the following:

- The amount of original cost or investment;
- The present, actual, or depreciated values of the remaining useful life;
- The salvage value;
- The date and type of construction;
- The lease term (original and remaining); and

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[12] City of Los Angeles v. Gage (1954) 127 Cal. App. 2d 442, 459, 274 P.2d 34.

[13] United Business Com. v. City of San Diego (1979) 91 Cal. App. 3d 156, 179, 154 Cal. Rptr. 263.

[14] City of Los Angeles v. Gage (1954) 127 Cal. App. 2d 442, 460, 274 P.2d 34.

[15] City of Santa Barbara v. Modern Neon Sign Co. (1961) 189 Cal. App. 2d 188, 194–196, 11 Cal. Rptr. 57.

[16] National Advertising Co. v. County of Monterey (1970) 1 Cal. 3d 875, 879, 83 Cal. Rptr. 577, 464 P.2d 33, *cert. denied*, 398 U.S. 946, 90 S. Ct. 1869, 26 L. Ed. 2d 286.

[17] National Advertising Co. v. County of Monterey (1970) 1 Cal. 3d 875, 879, 83 Cal. Rptr. 577, 464 P.2d 33, *cert. denied*, 398 U.S. 946, 90 S. Ct. 1869, 26 L. Ed. 2d 286.

[18] Bohannan v. City of San Diego (1973) 30 Cal. App. 3d 416, 426, 106 Cal. Rptr. 333.

[19] City of Los Angeles v. Gage (1954) 127 Cal. App. 2d 442, 460, 274 P.2d 34; *see* People v. Gates (1974) 41 Cal. App. 3d 590, 604, 116 Cal. Rptr. 172.

- The countervailing harm to the public if the use is maintained beyond the amortization period.[20]

In a case involving nonconforming illuminated signs, the court considered the signs' economic life, the duration and cost of the leases by which they were rented, their remaining post-compliance value, and the fact that each was constructed in accordance with city permits issued only a few months or weeks before the ordinance took effect.[21] The extent of amortization under Internal Revenue Service rules may also be a relevant factor.[22]

[5] Just Compensation

Like amortization, immediate abatement and payment of just compensation prevents the taking of private property for public use without payment.[23] A city or county that insists on immediately terminating a nonconforming use may acquire the nonconforming use by eminent domain.[24]

PRACTICE TIP: Purchasing or Selling A Nonconforming Use. Representing a purchaser or seller of a nonconforming use or structure presents special challenges. Evidence must be obtained to document that the use or structure was legal when established. This might include original building permits and copies of relevant former zoning ordinance provisions in effect at the time the structure was built or the use established. Locating these documents may involve extensive archival research at the local planning department. Further, evidence should be obtained to the buyer's satisfaction that the use has not been altered, expanded, or discontinued and is still considered legally nonconforming by the local jurisdiction. Consultation with the planning staff is advisable. All documentary evidence obtained should be carefully maintained for future use in connection with the sale of the property or any controversy about the legality of the use.

§§ 60.44–60.49 [Reserved]

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[20] United Business Com. v. City of San Diego (1979) 91 Cal. App. 3d 156, 181, 154 Cal. Rptr. 263; *see* Tahoe Regional Planning Agency v. King (1991) 233 Cal. App. 3d 1365, 1394–1400, 285 Cal. Rptr. 335 (upholding TRPA ordinance prohibiting off-site commercial signs, court held that First English Evangelical Lutheran Church v. County of Los Angeles (1987) 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250, did not eliminate amortization of nonconforming uses as method of implementing regulatory goals).

[21] City of Santa Barbara v. Modern Neon Sign Co. (1961) 189 Cal. App. 2d 188, 194, 11 Cal. Rptr. 57.

[22] National Advertising Co. v. County of Monterey (1970) 1 Cal. 3d 875, 879–880, 83 Cal. Rptr. 577, 464 P.2d 33.

[23] United Business Com. v. City of San Diego (1979) 91 Cal. App. 3d 156, 179, 154 Cal. Rptr. 263.

[24] *See, e.g.,* Metromedia, Inc. v. City of San Diego (1980) 26 Cal. 3d 848, 881, 164 Cal. Rptr. 510, 610 P.2d 407 (endorsing concept), *overruled on other grounds*, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800; City of La Mesa v. Tweed & Gambrell Mill (1956) 146 Cal. App. 2d 762, 775, 304 P.2d 803.

5. Sources of Zoning Power

§ 60.50 The United States Constitution

The United States Constitution reserves to the individual states, and, in turn, to local governments all powers not delegated to the federal government nor prohibited to the states.[1] Among the powers retained by the states is the police power, which is the power of government to protect the public health, safety, and general welfare.[2] A zoning regulation is a proper exercise of the police power if it is reasonably related to the public welfare.[3]

§ 60.51 The California Constitution

The California Constitution is the primary source of zoning power exercised by local governments. Cal. Const. art. XI, § 7, provides that a city or county may make and enforce within its limits all local and police ordinances and regulations not in conflict with general laws. The authority of local government under the police power is as broad as that of the state, except that local governments must exercise the power within their territorial limits consistent with state law.[1] For discussion of the territorial limits on the zoning power, see § 60.83. For discussion of the adoption and amendment of zoning ordinances by cities and counties, see §§ 60.20 and 60.21.

Various zoning regulations have been upheld under the police power, including the following:

- Regulations placing restrictions on the use of single-family dwellings to provide quiet residential areas;[2]
- Regulations affecting economic interests, such as rent control laws;[3]
- Regulations justified solely on aesthetic grounds;[4] and
- Restrictions on the placement of driveways.[5]

The police power is sufficiently elastic to accommodate changing societal conditions.[6]

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[1] U.S. Const. amend. X.

[2] Village of Euclid v. Ambler Realty Co. (1926) 272 U.S. 365, 387, 47 S. Ct. 114, 71 L. Ed. 303.

[3] Associated Home Builders Etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 604, 606–607, 135 Cal. Rptr. 41, 557 P.2d 473.

[1] Candid Enterprises, Inc. v. Grossmont Union High School Dist. (1985) 39 Cal. 3d 878, 885, 218 Cal. Rptr. 303, 705 P.2d 876; Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 140, 130 Cal. Rptr. 465, 550 P.2d 1001.

[2] Village of Belle Terre v. Boraas (1974) 416 U.S. 1, 9, 94 S. Ct. 1536, 39 L. Ed. 2d 797.

[3] Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 140, 130 Cal. Rptr. 465, 550 P.2d 1001.

[4] City Council v. Taxpayers for Vincent (1984) 466 U.S. 789, 816–817, 104 S. Ct. 2118, 80 L. Ed. 2d 772.

[5] Burchett v. City of Newport Beach (1995) 33 Cal. App. 4th 1472, 1475, 1481–1482, 40 Cal. Rptr. 2d 1.

[6] Village of Euclid v. Ambler Realty Co. (1926) 272 U.S. 365, 387, 47 S. Ct. 114, 71 L. Ed. 303; Miller v. Board of Public Works (1925) 195 Cal. 477, 484–485, 234 P. 381.

Another source of zoning power is the general legislative power conferred by Cal. Const. art. IV, § 1, pursuant to which the state Legislature has enacted the statutory scheme known as the California Planning and Zoning Law.[7]

Finally, Cal. Const. art. II, § 11, grants the power of initiative and referendum to the electorate of each city and county. For discussion of zoning by initiative and referendum, see § 60.21. For detailed coverage of initiatives and referendums, see Chapter 75, *Local Land Use Initiatives and Referendums*.

§ 60.52 The Planning and Zoning Law

The constitutional police power[1] of counties and general law cities[2] to zone property is limited by the Planning and Zoning Law.[3] This law sets minimum zoning standards for counties and general law cities/ but allows such cities and counties to adopt zoning regulations beyond the minimum standards so long as their regulations do not conflict with state law.[4] State law establishes exclusive procedures for enacting and administering zoning laws or regulations, which may not be restricted or limited by any other legislation.[5]

§ 60.53 City Charters

Unlike counties and general law cities, charter cities are generally governed by the terms of their own city charters rather than by state law.[1] Charter cities make and enforce their own zoning ordinances and regulations to govern municipal affairs. Ordinances enacted by a charter city that relate to purely municipal affairs prevail over state laws on the same subject.[2] Thus, a charter city's source of zoning power is its constitutionally derived police power as limited only by its own charter.

However, specific sections of the Planning and Zoning Law[3] apply equally to charter cities, and such cities may also choose to adopt the state law by charter or ordinance.[4] Charter cities are required by state law to do all of the following:

- Meet certain minimum procedural standards for the conduct of zoning hearings;[5]

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[7] Gov. Code § 65000 et seq.; *see* § 60.52.

[1] Cal. Const. art. XI, § 7; *see* § 60.51.

[2] A general law city is a city that has not adopted a charter. For discussion of the sources of the zoning power of charter cities, see § 60.53. For a list of charter cities and general law cities, see CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 260, *Sources and Limitations of Zoning Power* (Matthew Bender).

[3] Gov. Code § 65000 et seq.

[4] *See* Gov. Code § 65800.

[5] Gov. Code § 65802; *see* §§ 60.20, 60.21 (adopting and amending zoning ordinances).

[1] Cal. Const. art. XI, § 5.

[2] Committee of Seven Thousand v. Superior Court (1988) 45 Cal. 3d 491, 505, 247 Cal. Rptr. 362, 754 P.2d 708.

[3] Gov. Code § 65000 et seq.; *see* § 60.52.

[4] Gov. Code §§ 65700, 65803.

[5] Gov. Code § 65804.

- Adopt general plans containing the mandatory elements stated in Gov. Code § 65302;[6]
- Comply with provisions concerning general plans, specific plans, and the adoption and review of housing elements;[7] and
- Comply with various other specified provisions, such as Gov. Code §§ 65913–65918 regarding housing development approvals and incentives for low-income and moderate-income housing,[8] Gov. Code § 65852.3 regarding manufactured housing, and Gov. Code § 65561(d) regarding open space.

In 2018, the Legislature amended numerous zoning statutes to specify their applicability to charter cities.[9] The Legislature found and declared that it did so to address the lack of affordable housing in the state, and that ensuring the location, development, approval, and access to housing for all income levels in all jurisdictions in the state is a matter of statewide concern.[10]

§ 60.54 Initiative and Referendum

Zoning ordinances may be enacted, amended, or repealed by initiative and referendum as well as by the action of local legislative bodies.[1] Zoning by initiative or referendum extends to legislative acts,[2] but not to adjudicatory actions such as the grant or denial of special use permits.[3] Zoning by initiative must comply with the substantive zoning law, but not necessarily with its procedural requirements.[4] The source of zoning power exercised by the people through the initiative and referendum process derives from the legislative powers reserved by the people in the California Constitution.[5]

For a discussion of zoning by initiative and referendum, see § 60.21. For detailed coverage of all aspects of initiatives and referendums, see Chapter 75, *Local Land Use Initiatives and Referendums*.

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[6] Gov. Code §§ 65300, 65700(a).

[7] Gov. Code § 65700(b).

[8] Gov. Code §§ 65913.9, 65915–65918.

[9] 2018 Stats., Ch. 856, SB 1333. *See* Gov. Code §§ 65356, 65852.150, 65852.25, 65860, 65863, 65863.4, 65863.6, 65863.8, 65866, 65867.5, 65869.5. The Legislature also amended Gov. Code § 65700 to extend the applicability of Gov. Code §§ 65300.5, 65301.5, 65359, 65450, 65454, 65455, 65460.8, 65590, 65590.1, and 65580 et seq. to charter cities.

[10] 2018 Stats., Ch. 856, SB 1333, sec. 1.

[1] Arnel Development Co. v. City of Costa Mesa (1980) 28 Cal. 3d 511, 525, 169 Cal. Rptr. 904, 620 P.2d 565; Associated Home Builders Etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 588, 135 Cal. Rptr. 41, 557 P.2d 473.

[2] Arnel Development Co. v. City of Costa Mesa (1980) 28 Cal. 3d 511, 522, 525, 169 Cal. Rptr. 904, 620 P.2d 565; Wiltshire v. Superior Court (1985) 172 Cal. App. 3d 296, 304, 218 Cal. Rptr. 199.

[3] Wiltshire v. Superior Court (1985) 172 Cal. App. 3d 296, 304, 218 Cal. Rptr. 199.

[4] Building Industry Assn. v. City of Camarillo (1986) 41 Cal. 3d 810, 824, 226 Cal. Rptr. 81, 718 P.2d 68; Associated Home Builders Etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 591, 135 Cal. Rptr. 41, 557 P.2d 473.

[5] Cal. Const. art. IV, § 1.

§§ 60.55–60.59 [Reserved]

6. Constitutional Limits on Zoning Power

§ 60.60 Introduction to Substantive Due Process and Equal Protection

[1] Control of Land Use as Exercise of Police Power

In general, the control of land use through government regulation is a constitutional exercise of the police power.[1] Land use regulations, however, must not infringe on the right to be free from the deprivation of life, liberty, or property without due process of law or the right to enjoy the equal protection of the law.[2] Consequently, the enactment and implementation of land use regulations are subject to judicial review under the due process and equal protection clauses.[3]

[2] The Due Process Clause

[a] Procedural vs. Substantive Due Process

The Due Process Clause protects individuals against certain government actions that deprive a person of property or liberty.[4] Procedural due process requires that government action depriving the owner of a protected property right be implemented in a fair manner,[5] with procedural protections such as notice and the right to be heard by an unbiased decisionmaker.[6] Substantive due process, on the other hand, focuses on the government action itself, and precludes arbitrary and irrational decision-making

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[1] *See, e.g.,* Village of Euclid v. Ambler Realty Co. (1926) 272 U.S. 365, 397, 47 S. Ct. 114, 71 L. Ed. 303 (zoning); Griffin Development Co. v. City of Oxnard (1985) 39 Cal. 3d 256, 264–266, 217 Cal. Rptr. 1, 703 P.2d 339 (regulation of condominium conversions); Miller v. Board of Public Works (1925) 195 Cal. 477, 486, 234 P. 381 (zoning); Construction Industry Asso. v. Petaluma (9th Cir. 1975) 522 F.2d 897, 906–909, *cert. denied*, 424 U.S. 934 (growth controls); People v. Byers (1979) 90 Cal. App. 3d 140, 148, 153 Cal. Rptr. 249 (subdivision regulations); Metro Realty v. County of El Dorado (1963) 222 Cal. App. 2d 508, 518, 35 Cal. Rptr. 480 (interim controls).

[2] U.S. Const. amend. XIV; Cal. Const. art. I, § 7.

[3] *See, e.g.,* Consolidated Rock Products Co. v. City of Los Angeles (1962) 57 Cal. 2d 515, 520–521, 20 Cal. Rptr. 638, 370 P.2d 342, *appeal dismissed*, 371 U.S. 36, 83 S. Ct. 145, 9 L. Ed. 2d 112 (enforcement of a zoning restriction as it applies to a specific parcel); McCarthy v. City of Manhattan Beach (1953) 41 Cal. 2d 879, 891, 264 P.2d 932 (refusal to rezone a parcel); Kawaoka v. City of Arroyo Grande (9th Cir. 1994) 17 F.3d 1227, 1233, 1238 (challenge to revised general plan and temporary water moratorium); Cormier v. County of San Luis Obispo (1984) 161 Cal. App. 3d 850, 856–857, 207 Cal. Rptr. 880 (down zoning of a parcel); Claremont Taxpayers Asso. v. Claremont (1963) 223 Cal. App. 2d 589, 593, 35 Cal. Rptr. 907 (adoption of a general zoning ordinance).

[4] United States v. Salerno (1987) 481 U.S. 739, 746, 107 S. Ct. 2095, 95 L. Ed. 2d 697; Clark v. City of Hermosa Beach (1996) 48 Cal. App. 4th 1152, 1178 n.28, 56 Cal. Rptr. 2d 223.

[5] United States v. Salerno (1987) 481 U.S. 739, 746, 107 S. Ct. 2095, 95 L. Ed. 2d 697; Clark v. City of Hermosa Beach (1996) 48 Cal. App. 4th 1152, 1178 n.28, 56 Cal. Rptr. 2d 223.

[6] Morongo Band of Mission Indians v. State Water Resources Board (2009) 45 Cal. 4th 731, 737, 88 Cal. Rptr. 3d 610, 614–15. Cleveland Bd. of Education v. Loudermill (1985) 470 U.S. 532, 542, 105 S. Ct. 1487, 84 L. Ed. 2d 494; Horn v. County of Ventura (1979) 24 Cal. 3d 605, 612–613, 156 Cal. Rptr. 718, 596 P.2d 1134.

regardless of the fairness of the procedures used to implement the action.[7] Although both procedural and substantive due process challenges can arise in a land use context, § 60.60[2][b]–[d] below address only substantive due process.[8]

[b] Challenges Based on Substantive Due Process Grounds

There are two kinds of government action that can be challenged on substantive due process grounds in land use cases: (1) the enactment of an ordinance by a legislative body, and (2) the implementation of an ordinance by an agency or administrative body. In enactment challenges, substantive due process protects against arbitrary and irrational regulations. These challenges are often phrased as whether the ordinance exceeds the municipality's legitimate authority under the police power.[9] In implementation challenges, substantive due process protection has been described as preventing "governmental power from being used for purposes of oppression, or abuse of governmental power that shocks the conscience, or action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests."[10] Enactment challenges and implementation challenges are analyzed under slightly different tests.

[c] Requirement to Establish Cognizable Property Interest

A party asserting a substantive due process challenge must first establish that a property interest cognizable under the Fourteenth Amendment is at stake.[11] The Fourteenth Amendment, however, does not itself create property interests. Rather, property interests are created and defined by independent sources such as state law.[12] In a substantive due process challenge involving a discretionary approval or permit, a party has a cognizable property interest only when the party has a "clear entitlement"

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[7] Foucha v. Louisiana (1992) 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437; County of Sacramento v. Lewis (1998) 523 U.S. 833, 846–47 *abrogated on other grounds* by Saucier v. Katz (2001) 533 U.S. 194; Clark v. City of Hermosa Beach (1996) 48 Cal. App. 4th 1152, 1183, 56 Cal. Rptr. 2d 223.

[8] Section 60.60[2][b]–[d]. For a discussion of procedural due process issues, see §§ 60.20, 60.33.

[9] *See, e.g.,* Griffin Development Co. v. City of Oxnard (1985) 39 Cal. 3d 256, 263, 217 Cal. Rptr. 1, 703 P.2d 339; Associated Home Builders Etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 601, 135 Cal. Rptr. 41, 557 P.2d 473; Lockard v. City of Los Angeles (1949) 33 Cal. 2d 453, 460, 202 P.2d 38; Echevarietta v. City of Rancho Palos Verdes (2001) 86 Cal. App. 4th 472, 479, 103 Cal. Rptr. 2d 165; Kucera v. Lizza (1997) 59 Cal. App. 4th 1141, 1147–1148, 69 Cal. Rptr. 2d 582.

[10] PFZ Properties, Inc. v. Rodriguez (1st Cir. 1991) 928 F.2d 28, 31–32; County of Sacramento v. Lewis (1998) 523 U.S. 833, 846–47, *abrogated on other grounds* by Saucier v. Katz (2001) 533 U.S. 194; Clark v. City of Hermosa Beach (1996) 48 Cal. App. 4th 1152, 1185, 56 Cal. Rptr. 2d 223 (internal quotation marks and citations omitted).

[11] Zorzi v. County of Putnam (7th Cir. 1994) 30 F.3d 885, 894; Gardner v. Baltimore Mayor & City Council (4th Cir. 1992) 969 F.2d 63, 68; Clark v. City of Hermosa Beach (1996) 48 Cal. App. 4th 1152, 1184, 56 Cal. Rptr. 2d 223, Community Youth Athletic Center v. City of National City (2013) 220 Cal. App. 4th 1385, 1432, 164 Cal. Rptr. 3d 644, 684.

[12] Board of Regents v. Roth (1972) 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548; Gardner v. Baltimore Mayor & City Council (4th Cir. 1992) 969 F.2d 63, 68 (noting that several circuits have applied the *Roth* standard, which arose in a procedural due process context, to substantive due process challenges to municipal land use decisions); Palm v. Los Angeles Department of Water and Power (9th Cir. 2018) 889 F.3d 1081, 1085–86; Lockary v. Kayfetz (9th Cir. 1990) 917 F.2d 1150, 1156.

to the permit or approval being sought from the governmental official or administrative party.[13] One of the most common protected property interests in the land use context is the vested right to develop a particular project.[14] Whether a party has a "clear entitlement" will depend on the amount of discretion that the local agency has to deny issuance of the permit or to withhold its approval.[15] A party will not be able to establish a cognizable property interest if the local agency is able to exercise any significant discretion.[16]

[d] Application of Substantive Due Process to Economic and Property Rights

Prior to the U.S. Supreme Court's decision in *Graham v. Connor*[17] and the Ninth Circuit Court of Appeals' decision in *Armendariz v. Penman*,[18] substantive due process claims in the land use context were fairly common. However, those cases severely limited application of substantive due process to such claims.[19] Specifically, *Armendariz*, following the rationale set forth in *Graham*, concluded that substantive due process analysis had no place in contexts already addressed by explicit textual provisions of constitutional protection, regardless of whether the plaintiff's potential claims under those amendments had merit.[20]

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[13] Gardner v. Baltimore Mayor & City Council (4th Cir. 1992) 969 F.2d 63, 68; Clark v. City of Hermosa Beach (1996) 48 Cal. App. 4th 1152, 1180–1181, 56 Cal. Rptr. 2d 223.

[14] Stubblefield Construction Co. v. City of San Bernardino (1995) 32 Cal. App. 4th 687, 706, 38 Cal. Rptr. 2d 413, 422–23.

[15] Gardner v. Baltimore Mayor & City Council (4th Cir. 1992) 969 F.2d 63, 68; Clark v. City of Hermosa Beach (1996) 48 Cal. App. 4th 1152, 1180–1181, 56 Cal. Rptr. 2d 223.

[16] Gardner v. Baltimore Mayor & City Council (4th Cir. 1992) 969 F.2d 63, 68; Clark v. City of Hermosa Beach (1996) 48 Cal. App. 4th 1152, 1180, 56 Cal. Rptr. 2d 223; Las Lomas Land Co., LLC v. City of Los Angeles (2009) 177 Cal. App. 4th 837, 854, 99 Cal. Rptr. 3d 503, 518 (a city's denial of annexation, development agreement, specific plan, and development entitlements did not constitute a deprivation of property for purposes of procedural due process under the Fourteenth Amendment); *but see* DeBlasio v. Zoning Bd. of Adjustment (3d Cir. 1995) 53 F.3d 592, 600–601 (landowner has a cognizable property interest, as a matter of law, when a governmental decision impinges on the landowner's use and enjoyment of property and that decision was arbitrarily or irrationally reached). However, a court of appeal has rejected the reasoning of *DeBlasio*. Breneric Associates v. City of Del Mar (1998) 69 Cal. App. 4th 166, 182, 81 Cal. Rptr. 2d 324 (denial of discretionary building permit on aesthetic grounds did not infringe on a constitutionally protected property interest).

[17] Graham v. Connor (1989) 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443.

[18] Armendariz v. Penman (9th Cir. 1996) 75 F.3d 1311.

[19] Armendariz v. Penman (9th Cir. 1996) 75 F.3d 1311, 1318–1320.

[20] Armendariz v. Penman (9th Cir. 1996) 75 F.3d 1311, 1326; *see* Graham v. Connor (1989) 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (claims of excessive force brought under 42 U.S.C. § 1983 must be analyzed under more specific Fourth or Eighth Amendments rather than under more subjective standard of substantive due process); Albright v. Oliver (1994) 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (reaffirming *Graham* rule when plaintiff alleged that defendants violated his substantive due process rights by initiating criminal prosecution without probable cause); County of Sacramento v. Lewis (1998) 523 U.S. 833, 843, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (if constitutional claim is covered by specific constitutional provision, claim must be analyzed under standard appropriate to that specific provision, not

However, a unanimous U.S. Supreme Court signaled a new direction for due process claims in the land use context in *Lingle v. Chevron U.S.A. Inc.*[21] In that case, the Court held that a property owner's challenge that a regulation did not substantially advance legitimate interests is grounded in due process, not the Takings Clause. The change in doctrine was recognized by *Crown Point Development, Inc. v. City of Sun Valley*,[22] where the Ninth Circuit affirmed the potential for substantive due process claims in land use cases, holding that *Lingle* made it clear that there is no specific textual source in the Fifth Amendment for protecting a property owner from conduct that furthers no legitimate government purpose.[23] Other cases followed suit.[24] Thus, the *Graham* and *Armendariz* rationale no longer applies to claims that a governmental entity's actions were arbitrary and unreasonable, lacking any substantial relation to the public health, safety, or general welfare.[25]

The Ninth Circuit concluded that the Fifth Amendment precludes a due process challenge only if the alleged conduct is actually covered by the Takings Clause.[26] *Lingle* indicated that a claim of arbitrary action would not be such a challenge.[27] Thus, in *Crown Point*, a developer could state a substantive due process claim based on the city's allegedly arbitrary and irrational denial of its permit application.[28]

The California Constitution also guarantees due process, and California courts have extended more generous protection to substantive due process rights.[29]

For a discussion of takings claims, see Chapter 65, *Takings and Other Constitutional Controls*.

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under rubric of substantive due process); Macri v. King County (9th Cir. 1997) 126 F.3d 1125, 1127–1128 (substantive due process challenge cannot be asserted if challenge can be asserted under explicit constitutional provision such as the takings clause); Patel v. Penman (9th Cir. 1996) 103 F.3d 868, 874–875; Sinclair Oil Corp. v. County of Santa Barbara (9th Cir. 1996) 96 F.3d 401, 407.

[21] Lingle v. Chevron U.S.A. Inc. (2005) 544 U.S. 528, 542, 125 S. Ct. 2074, 2085, 161 L. Ed. 2d 876.

[22] Crown Point Development, Inc. v. City of Sun Valley (9th Cir. 2007) 506 F.3d 851.

[23] Crown Point Development, Inc. v. City of Sun Valley (9th Cir. 2007) 506 F.3d 851, 856.

[24] Shanks v Dressel (9th Cir 2008) 540 F.3d 1082, 1087; North Pacifica LLC v City of Pacifica (9th Cir 2008) 526 F3d 478; Action Apartment Ass'n v Santa Monica Rent Control Opinion Bd. (9th Cir 2007) 509 F3d 1020; Equity Lifestyle Props., Inc. v County of San Luis Obispo (9th Cir 2007) 505 F3d 860

[25] Crown Point Development, Inc. v. City of Sun Valley (9th Cir. 2007) 506 F.3d 851, 855.

[26] Crown Point Development, Inc. v. City of Sun Valley (9th Cir. 2007) 506 F.3d 851, 856.

[27] Crown Point Development, Inc. v. City of Sun Valley (9th Cir. 2007) 506 F.3d 851, 855.

[28] Crown Point Development, Inc. v. City of Sun Valley (9th Cir. 2007) 506 F.3d 851, 857; *see also* North Pacifica LLC v. City of Pacifica (9th Cir. 2008) 526 F.3d 478, 485–486 (recognizing that challenge to land use regulation may state substantive due process claim, but holding that developer failed to adequately allege denial of due process because it failed to show arbitrary or irrational conduct in connection with city's delay in processing permit application).

[29] *See* Kavanau v. Santa Monica Rent Control Bd. (1997) 16 Cal. 4th 761, 771–780, 66 Cal. Rptr. 2d 672, 941 P.2d 851 (providing conceptual distinction between substantive due process clause and the takings clause in context of rent control); Clark v. City of Hermosa Beach (1996) 48 Cal. App. 4th 1152, 1184, 56 Cal. Rptr. 2d 223 (court noted narrowing of substantive due process yet assumed it remained viable as a check on land use decisions).

[3] The Equal Protection Clause

The Equal Protection Clause guarantees that no person or class of persons shall be denied the same protection of law that is enjoyed by other persons or classes in similar circumstances.[30] Land use regulations by their very nature, however, classify and treat property differently. Treating property differently—even contiguous or similar property—does not alone make zoning unreasonable.[31] Generally, an equal protection challenge is asserted when a land use regulation makes an arbitrary and discriminatory classification.

Whether a land use classification can withstand an equal protection challenge will depend on the kind of classification drawn and the rationale for the classification. The first hurdle for a plaintiff, however, is proof that a party's property has been treated differently from similarly situated property.[32]

It is easy to confuse equal protection and due process challenges, particularly when the challenges involve fundamental rights. For example, zoning regulations that restrict the number of persons who can live together in one residence have been analyzed as infringing the fundamental right to privacy on both equal protection and due process grounds, as well as on equal protection grounds without regard to privacy.[33] Regulations that infringe on the fundamental right to travel[34] are typically analyzed under the equal protection clause;[35] however, right to travel challenges in the context of land use regulations have been analyzed under both the equal protection and due process clauses.[36]

Although many cases involve both due process and equal protection, these are two separate and distinct doctrines. Essentially, due process focuses on the validity of

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[30] Hawn v. County of Ventura (1977) 73 Cal. App. 3d 1009, 1018, 141 Cal. Rptr. 111.

[31] Consolidated Rock Products Co. v. City of Los Angeles (1962) 57 Cal. 2d 515, 532–533, 20 Cal. Rptr. 638, 370 P.2d 342, *appeal dismissed*, 371 U.S. 36, 83 S. Ct. 145, 9 L. Ed. 2d 112; Ensign Bickford Realty Corp. v. City Council (1977) 68 Cal. App. 3d 467, 477, 137 Cal. Rptr. 304; Hernandez v. City of Hanford (2007) 41 Cal. 4th 279, 302.

[32] Stubblefield Construction Co. v. City of San Bernardino (1995) 32 Cal. App. 4th 687, 713–714, 38 Cal. Rptr. 2d 413; Kawaoka v. City of Arroyo Grande (9th Cir. 1994) 17 F.3d 1227, 1240.

[33] *Compare* Village of Belle Terre v. Boraas (1974) 416 U.S. 1, 7–8, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (privacy and equal protection), *with* Moore v. City of East Cleveland, Ohio (1977) 431 U.S. 494, 501–504, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (privacy and substantive due process), City of Santa Barbara v. Adamson (1980) 27 Cal. 3d 123, 129–130, 164 Cal. Rptr. 539, 610 P.2d 436 (privacy and substantive due process), *and* College Area Renters & Landlord Assn. v. City of San Diego (1996) 43 Cal. App. 4th 677, 686–688, 50 Cal. Rptr. 2d 515 (equal protection without regard to privacy). For a discussion of the right to privacy, see § 60.65.

[34] *See* § 60.66, *below*.

[35] *See, e.g.,* Shapiro v. Thompson (1969) 394 U.S. 618, 626–627, 89 S. Ct. 1322, 22 L. Ed. 2d 600; Saenz v. Roe (1999) 526 U.S. 489, 119 S. Ct. 1518, 143 L. Ed. 2d 689.

[36] Village of Belle Terre v. Boraas (1974) 416 U.S. 1, 7–8, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (equal protection); Tobe v. City of Santa Ana (1995) 9 Cal. 4th 1069, 1096–1101, 40 Cal. Rptr. 2d 402, 892 P.2d 1145 (reviewing federal and state right to travel cases); Associated Home Builders Etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 600, 135 Cal. Rptr. 41, 557 P.2d 473 & n.18, 18 Cal. 3d 582, 135 Cal. Rptr. 41, 557 P.2d 473 (due process).

legislation as it equally burdens all persons in the exercise of a specific right, whereas equal protection focuses on the validity of legislation that allows some individuals to exercise a specific right while denying it to others.

§ 60.61 The Constitutional Tests

[1] Rational Basis vs. Strict Scrutiny

Challenges to land use regulations often include both due process and equal protection claims.[1] The tests for determining violations of these two separate doctrines are essentially equivalent, and courts frequently employ the tests without specifying which doctrine is being addressed.[2] Because of this, it is more practical to examine due process and equal protection challenges in terms of the judicial standards employed by the courts rather than as separate doctrines.

Courts use two traditional constitutional tests to evaluate equal protection and due process challenges to zoning regulations. Most zoning regulations are subject to the "rational basis" test under which a court simply evaluates whether the regulation or classification is rationally related to a legitimate government interest because a fundamental right is not involved.[3] Zoning regulations that deprive a person of a fundamental right, however, are subject to "strict scrutiny."[4] Zoning regulations that use classifications which infringe on the exercise of a fundamental right or are based on the suspect characteristics of race, national origin, or alienage are also subject to strict

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[1] *See, e.g.,* Stubblefield Construction Co. v. City of San Bernardino (1995) 32 Cal. App. 4th 687, 706–707, 38 Cal. Rptr. 2d 413; Kawaoka v. City of Arroyo Grande (9th Cir. 1994) 17 F.3d 1227, 1233, 1238; Christensen v. Yolo County Board of Supervisors (9th Cir. 1993) 995 F.2d 161, 165; Lockary v. Kayfetz (9th Cir. 1990) 917 F.2d 1150, 1155; Nelson v. City of Selma (9th Cir. 1989) 881 F.2d 836, 837; *see also* § 60.60[3], *below*.

[2] *See* Christensen v. Yolo County Board of Supervisors (9th Cir. 1993) 995 F.2d 161, 165; Nelson v. City of Selma (9th Cir. 1989) 881 F.2d 836, 838–839; Lockary v. Kayfetz (9th Cir. 1990) 917 F.2d 1150, 1155.

[3] New Orleans v. Dukes (1976) 427 U.S. 297, 303, 96 S. Ct. 2513, 49 L. Ed. 2d 511; Village of Belle Terre v. Boraas (1974) 416 U.S. 1, 7–8, 94 S. Ct. 1536, 39 L. Ed. 2d 797; Griffin Development Co. v. City of Oxnard (1985) 39 Cal. 3d 256, 263–264, 217 Cal. Rptr. 1, 703 P.2d 339; Associated Home Builders Etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 604–605, 135 Cal. Rptr. 41, 557 P.2d 473; Lockard v. City of Los Angeles (1949) 33 Cal. 2d 453, 461, 202 P.2d 38; College Area Renters & Landlord Assn. v. City of San Diego (1996) 43 Cal. App. 4th 677, 686, 50 Cal. Rptr. 2d 515; *see* § 60.61[2], *below* (rational basis).

[4] Moore v. City of East Cleveland, Ohio (1977) 431 U.S. 494, 499, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (strict scrutiny applied to residential zoning restriction implicating privacy rights); City of Santa Barbara v. Adamson (1980) 27 Cal. 3d 123, 130–131, 164 Cal. Rptr. 539, 610 P.2d 436; *see* § 60.61[3], *below* (strict scrutiny); *see also* §§ 60.63 (freedom of expression), 60.64 (freedom of religion), 60.65 (right to privacy).

scrutiny.[5] Under strict scrutiny, a court evaluates whether the regulation or classification is necessary to achieve a compelling governmental interest.[6]

[2] Rational Basis

[a] Introduction

Constitutional principles do not preclude all discrimination between people or all deprivations of rights. Land use regulations necessarily entail some limitation on land owners' rights[7] and almost always adversely affect someone's property interests.[8] A zoning ordinance that treats one class of persons differently from another is not necessarily an unconstitutional denial of equal protection. In fact, the right to treat different classes of property differently has been explicitly upheld.[9] When there is no suspect classification or fundamental right, and the discrimination complained of is purely economic, a zoning ordinance is valid under the equal protection clause if it bears a rational relationship to a legitimate state purpose.[10] Similarly, when a zoning ordinance deprives a person of property or liberty and no fundamental right is involved, the ordinance is constitutional under the due process clause if it is reasonably related to the accomplishment of a legitimate governmental purpose or bears a rational

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[5] Cleburne v. Cleburne Living Center, Inc. (1985) 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313; Serrano v. Priest (1976) 18 Cal. 3d 728, 761–762, 135 Cal. Rptr. 345, 557 P.2d 929; College Area Renters & Landlord Assn. v. City of San Diego (1996) 43 Cal. App. 4th 677, 686, 50 Cal. Rptr. 2d 515; Kawaoka v City of Arroyo Grande (9th Cir 1994) 17 F3d 1227, 1239; *see* § 60.61[3], *below* (strict scrutiny); *see also* § 60.66 (right to travel).

[6] Cleburne v. Cleburne Living Center, Inc. (1985) 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313; Serrano v. Priest (1976) 18 Cal. 3d 728, 761, 135 Cal. Rptr. 345, 557 P.2d 929; College Area Renters & Landlord Assn. v. City of San Diego (1996) 43 Cal. App. 4th 677, 686, 50 Cal. Rptr. 2d 515.

[7] Nash v. City of Santa Monica (1984) 37 Cal. 3d 97, 104, 207 Cal. Rptr. 285, 688 P.2d 894, *appeal dismissed*, 470 U.S. 1046, 105 S. Ct. 1740, 84 L. Ed. 2d 807 (1985) (rent control ordinance upheld by California Supreme Court was superseded by statute).

[8] McCarthy v. City of Manhattan Beach (1953) 41 Cal. 2d 879, 890, 264 P.2d 932; Ensign Bickford Realty Corp. v. City Council (1977) 68 Cal. App. 3d 467, 477, 137 Cal. Rptr. 304 (zoning ordinances may be expected to depress value of some land).

[9] *See* Nordlinger v. Hahn (1992) 505 U.S. 1, 37 112 S. Ct. 2326, 2346 ("A zoning system functions by recognizing different uses of property and treating those different uses differently." Then citing Village of Euclid v. Ambler Realty Co. (1926) 272 U.S. 365, 388–390, 47 S. Ct. 114, 71 L. Ed. 303); Schad v. Borough of Mount Ephraim 1981 452 U.S. 61, 68, 101 S. Ct. 2176, 2182 ("The power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities. But the zoning power is not infinite and unchallengeable; it 'must be exercised within constitutional limits.' ").

[10] Hernandez v. City of Hanford (2007) 41 Cal. 4th 279, 302; Hale v. Morgan (1978) 22 Cal. 3d 388, 395, 149 Cal. Rptr. 375, 584 P.2d 512; College Area Renters & Landlord Assn. v. City of San Diego (1996) 43 Cal. App. 4th 677, 686, 50 Cal. Rptr. 2d 515 (ordinance regulating number of persons over 18 who could live together in nonowner occupied residences made irrational distinction between nonowner and owner occupied residences); Stubblefield Construction Co. v. City of San Bernardino (1995) 32 Cal. App. 4th 687, 712–713, 38 Cal. Rptr. 2d 413 (zoning actions including urgency ordinance, moratorium, and revisions to zoning ordinance and general plan all made rational classifications); Cotati Alliance for Better Housing v. City of Cotati (1983) 148 Cal. App. 3d 280, 291, 195 Cal. Rptr. 825.

relationship to the general welfare.[11] Government action implementing land use regulations violates due process only if it shocks the conscience of judges.[12]

[b] Judicial Deference to Zoning Legislation

The modern rational basis test applies a highly deferential standard of judicial review to land use regulation. Zoning legislation is generally presumed to be constitutional, and this presumption can only be overcome by a "clear showing of arbitrariness and irrationality."[13] Note, however, that Evid. Code § 669.5 reverses this presumption for certain building restrictions and requires the enacting city or county to prove the validity of the restriction.[14] Reviewing courts are reluctant to second guess the policy judgments made by legislators in enacting particular zoning regulations and classifications. If reasonable minds might differ, the court will not substitute its judgment for that of the legislative body.[15] It is immaterial whether alternative zoning legislation may be more reasonable than or superior to the legislation being challenged.[16]

Zoning necessarily entails "line drawing," and it is not the province of the court to interfere, absent of a clear showing of an abuse of discretion.[17] Despite the tremendous amount of deference afforded zoning legislation, however, rational basis review is more than a rubber stamp—ordinances have failed its deferential scrutiny.[18]

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[11] Hotop v. City of San Jose (9th Cir. 2020) 982 F.3d 710, 717; Equity Lifestyle Properties, Inc. v. County of San Luis Obispo (9th Cir. 2008) 548 F.3d 1184, 1195; Griffin Development Co. v. City of Oxnard (1985) 39 Cal. 3d 256, 264–266, 217 Cal. Rptr. 1, 703 P.2d 339 (city's regulation of condominium conversions reasonably related to legitimate government purpose of preserving supply of rental housing); Associated Home Builders Etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 601–602, 606, 135 Cal. Rptr. 41, 557 P.2d 473; Lockard v. City of Los Angeles (1949) 33 Cal. 2d 453, 461, 202 P.2d 38 (upholding city's refusal to extend boundaries of industrial zone).

[12] Clark v. City of Hermosa Beach (1996) 48 Cal. App. 4th 1152, 1185–1186, 56 Cal. Rptr. 2d 223.

[13] Kawaoka v. City of Arroyo Grande (9th Cir. 1994) 17 F.3d 1227, 1234 (citations omitted); Lockard v. City of Los Angeles (1949) 33 Cal. 2d 453, 460, 202 P.2d 38.

[14] *See* § 60.100[4] (burden of proof).

[15] Consolidated Rock Products Co. v. City of Los Angeles (1962) 57 Cal. 2d 515, 522–523, 20 Cal. Rptr. 638, 370 P.2d 342, *appeal dismissed*, 371 U.S. 36, 83 S. Ct. 145, 9 L. Ed. 2d 112 (upholding zoning that treated large, contiguous parcels differently); Lockard v. City of Los Angeles (1949) 33 Cal. 2d 453, 461, 202 P.2d 38 (upholding city's refusal to extend boundaries of industrial zone); San Franciscans Upholding the Downtown Plan v. City and County of San Francisco (2013) 102 Cal. App. 4th 656, 674, 125 Cal. Rptr. 2d 745, 756 (the court may not substitute its own views for that of the agency or reweigh conflicting evidence where the agency approved a redevelopment project supported by substantial evidence).

[16] Perez v. City of San Bruno (1980) 27 Cal. 3d 875, 889, 892–893, 168 Cal. Rptr. 114, 616 P.2d 1287 (upholding requirement that city residents pay unified bill including municipal services they do not use).

[17] Consolidated Rock Products Co. v. City of Los Angeles (1962) 57 Cal. 2d 515, 533, 20 Cal. Rptr. 638, 370 P.2d 342, *appeal dismissed*, 371 U.S. 36, 83 S. Ct. 145, 9 L. Ed. 2d 112 (upholding zoning that treated large, contiguous parcels differently).

[18] *See, e.g.,* Coalition Advocating Legal Housing Options v. City of Santa Monica (2001) 88 Cal. App. 4th 451, 462 (ordinance classifying permissible users of second units lacks a reasonable relationship to a legitimate public purpose; College Area Renters & Landlord Assn. v. City of San Diego (1996) 43 Cal. App. 4th 677, 686, 50 Cal. Rptr. 2d 515 (ordinance regulating number of persons over 18 who could live

Generally, a land use regulation will be upheld if it is reasonably related to any legitimate public purpose regardless of whether the regulation actually advances its stated purpose.[19] Legitimate purposes include the promotion or protection of the public health, safety, morals, or general welfare.[20] Under modern law, the general welfare encompasses aesthetics, property values, economic prosperity, community character, limits on growth, and other values.[21] The United States Supreme Court has stated that when there are plausible reasons for an exercise of the police power, judicial inquiry is at an end. It is constitutionally irrelevant whether the plausible reasons discovered by the court actually motivated the legislative decision.[22]

A court applying the rational basis test generally will not review a legislator's subjective motivation or good faith in adopting a zoning ordinance.[23] Some California courts, however, have been willing to scrutinize the motives and intent behind legislation, even under the rational basis standard, when reviewing the zoning of individual parcels, especially when considering allegations of "spot zoning" or "manipulation of land values."[24]

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together in nonowner occupied residences made irrational distinction between nonowner and owner occupied residences); Elysium Institute, Inc. v. County of Los Angeles (1991) 232 Cal. App. 3d 408, 427–28, 432, 283 Cal. Rptr. 688 (ordinance distinguishing between nudist camps and recreational clubs lacks a reasonable relationship to a legitimate public purpose; Gawzner Corp. v. Minier (1975) 46 Cal. App. 3d 777, 791, 120 Cal. Rptr. 344 (sign ordinance that applies to motels but not to hotels violates equal protection); Carlin v. City of Palm Springs (1971) 14 Cal. App. 3d 706, 710, 715, 92 Cal. Rptr. 535 (sign ordinance distinguishing between signs advertising rates and nonrate signs creates an invalid classification).

[19] Kawaoka v. City of Arroyo Grande (9th Cir. 1994) 17 F.3d 1227, 1234 (upholding city's revised general plan and temporary water moratorium); Griffith v. City of Santa Cruz (2012) 207 Cal. App. 4th 982, 994. County of Los Angeles v. Hill (2011) 192 Cal. App. 4th 861, 871, 121 Cal. Rptr. 3d 722, 730 (ordinance imposing stricter zoning restrictions on medical marijuana dispensaries than on pharmacies has rational basis.).

[20] Miller v. Board of Public Works (1925) 195 Cal. 477, 488, 234 P. 381.

[21] *See, e.g.,* City Council v. Taxpayers For Vincent (1984) 466 U.S. 789, 805, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (aesthetics); Echevarietta v. City of Rancho Palos Verdes (2001) 86 Cal. App. 4th 472, 479, 103 Cal. Rptr. 2d 165 (ordinance imposing height limitations on pre-existing foliage); Kucera v. Lizza (1997) 59 Cal. App. 4th 1141, 1147–1148, 69 Cal. Rptr. 2d 582 (upholding city's view and sunlight preservation ordinance); Ross v. City of Rolling Hills Estates (1987) 192 Cal. App. 3d 370, 374–375, 238 Cal. Rptr. 561 (upholding city's view protection ordinance); Dateline Builders, Inc. v. City of Santa Rosa (1983) 146 Cal. App. 3d 520, 532, 194 Cal. Rptr. 258; *see also* Briggs v. City of Rolling Hills Estates (1995) 40 Cal. App. 4th 637, 644, 47 Cal. Rptr. 2d 29 (upholding provision in neighborhood compatibility ordinance requiring designs to respect existing privacy of surrounding properties).

[22] United States R. Retirement Bd. v. Fritz (1980) 449 U.S. 166, 179, 101 S. Ct. 453, 66 L. Ed. 2d 368; *see also* Naismith Dental Corp. v. Board of Dental Examiners (1977) 68 Cal. App. 3d 253, 259, 137 Cal. Rptr. 133; Stanley v. City & County of San Francisco (1975) 48 Cal. App. 3d 575, 581, 121 Cal. Rptr. 842.

[23] *See, e.g.,* McCarthy v. City of Manhattan Beach (1953) 41 Cal. 2d 879, 894, 264 P.2d 932; Stubblefield Construction Co. v. City of San Bernardino (1995) 32 Cal. App. 4th 687, 714, 38 Cal. Rptr. 2d 413; County of Butte v. Bach (1985) 172 Cal. App. 3d 848, 862 n.1, 218 Cal. Rptr. 613; *see also* City of Santa Cruz v. Superior Court (1995) 40 Cal. App. 4th 1146, 1155–1156, 48 Cal. Rptr. 2d 216 (legislative privilege extended to city staff and commissioners when deposing those individuals would reveal evidence concerning city council's motives in approving general plan).

[24] *See, e.g.,* Arnel Dev. Co. v. City of Costa Mesa (1981) 126 Cal. App. 3d 330, 335–336, 178 Cal.

[c] Arbitrary or Irrational Conduct

In substantive due process challenges involving government conduct such as the rejection of a development project or the refusal to issue a building permit, the courts employ an irrational or arbitrary conduct test that asks whether the challenged government conduct would "shock the conscience of . . . judges."[25] To satisfy this standard, the plaintiff must show that the government's conduct amounted to a "high level of outrageousness" and a magnitude of potential or actual harm that is "truly conscience shocking."[26] California courts generally have held that rejection of development projects and refusal to issue building permits do not rise to the level of constitutional deprivation even if public officials taking such actions have allegedly violated state law or administrative procedures.[27]

Government conduct challenges have been more successful in federal court than state court.[28] Before a federal court will hear such a challenge, however, it must be ripe. Ripeness prevents the premature adjudication of administrative actions and is applicable in the context of "as applied" challenges, not facial challenges.[29] A constitutional challenge to a land use regulation is ripe when the landowner or developer has received a final decision from the government agency regarding how it will apply the regulations at issue to the property in question.[30] Typically, this requires that the landowner has submitted at least one formal development plan and sought a variance from any regulations barring development of the proposed plan.[31] Although the courts have recognized a "futility exception," under which application for a variance may be excused if it would be futile, the exception does not relieve a party's obligation to file at least one meaningful development plan.[32] For detailed coverage of ripeness

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Rptr. 723. For a discussion of "spot zoning" and "manipulation of land values," see § 60.62[1] and [4], respectively.

[25] Clark v. City of Hermosa Beach (1996) 48 Cal. App. 4th 1152, 1185, 56 Cal. Rptr. 2d 223 (internal quotation marks and citation omitted). *Galland v. City of Clovis* (2001) 24 Cal. 4th 1003, 1040.

[26] Clark v. City of Hermosa Beach (1996) 48 Cal. App. 4th 1152, 1185–1186, 56 Cal. Rptr. 2d 223.

[27] Burchett v. City of Newport Beach (1995) 33 Cal. App. 4th 1472, 1482, 40 Cal. Rptr. 2d 1; Stubblefield Construction Co. v. City of San Bernardino (1995) 32 Cal. App. 4th 687, 709, 38 Cal. Rptr. 2d 413; *see* Clark v. City of Hermosa Beach (1996) 48 Cal. App. 4th 1152, 1186, 56 Cal. Rptr. 2d 223 (councilmember's conflict of interest in voting on project not sufficient to satisfy standard).

[28] *See, e.g.,* Cohan v. City of Thousand Oaks (1994) 30 Cal. App. 4th 547, 561, 35 Cal. Rptr. 2d 782 (cumulative effects of city council's actions violated permit applicants' substantive due process rights); Bateson v. Geisse (9th Cir. 1988) 857 F.2d 1300, 1304 (city council's refusal to issue building permit violated property owner's rights where all requirements for issuance of permit had been satisfied); Herrington v. County of Sonoma (9th Cir. 1987) 834 F.2d 1488, 1506–1507 (county's denial of subdivision application and subsequent down zoning of property violated owner's rights).

[29] Pakdel v. City and County of San Francisco (2020) 952 F.3d 1157, 1163; Kawaoka v. City of Arroyo Grande (9th Cir. 1994) 17 F.3d 1227, 1232.

[30] MacDonald, Sommer & Frates v. County of Yolo et al. (1986) 477 U.S. 340, 351, 106 S. Ct. 2561, 91 L. Ed. 2d 285.

[31] Herrington v. County of Sonoma (9th Cir. 1988) 857 F.2d 567, 569.

[32] *See, e.g.,* Kawaoka v. City of Arroyo Grande (9th Cir. 1994) 17 F.3d 1227, 1232 (substantive due

requirements in takings claims, see Chapter 65, *Takings and Other Constitutional Controls*, § 65.40.

[d] Regional Welfare Limitation

The California Supreme Court introduced a new constitutional limitation on the exercise of a local government's regulatory power over land use, the "regional welfare" limitation, in *Associated Home Builders, Etc. v. City of Livermore*.[33] In *Livermore*, the Court held that local land use decisions must be rationally related not only to the interests of the immediate community, but to the interests of the region as well, especially when the supply and distribution of housing in the region are involved. The Court noted that municipalities are not isolated from the needs and problems of the area in which they are located, and an ordinance that appears reasonable from the limited viewpoint of the municipality may be unreasonable when viewed from a larger perspective.

The proper constitutional test is whether the ordinance reasonably relates to the welfare of those whom it significantly affects.[34] Although some older cases have recognized the duty of a locality to be mindful of the spillover effects of its land use decisions,[35] *Livermore* was the first California case to require consideration of regional effects as a matter of constitutional law.

Livermore established a three-step process by which a trial court determines whether a challenged land use regulation reasonably relates to the regional welfare. The trial court should do all of the following:[36]

- Forecast the probable effect and duration of the regulation;
- Identify the competing regional interests affected by the regulation; and
- Determine whether the regulation, in light of its probable impact, represents a reasonable accommodation of those competing interests.

The expanded constitutional scrutiny of land use regulations under the regional welfare test was followed in *Arnel Development Co. v. City of Costa Mesa*[37] to invalidate a voter-approved rezoning for failing to consider regional housing needs.[38]

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process challenge was not ripe because property owners had never submitted formal development plans); Del Monte Dunes at Monterey v. Monterey (9th Cir. 1990) 920 F.2d 1496, 1501 (discussing futility exception).

[33] Associated Home Builders Etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 607, 135 Cal. Rptr. 41, 557 P.2d 473.

[34] Associated Home Builders Etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 607, 135 Cal. Rptr. 41, 557 P.2d 473.

[35] Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel (N.J. 1975) 67 N.J. 151, 336 A.2d 713, 726; Scott v. City of Indian Wells (1972) 6 Cal. 3d 541, 548, 99 Cal. Rptr. 745, 492 P.2d 1137.

[36] Associated Home Builders Etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 608–609, 135 Cal. Rptr. 41, 557 P.2d 473.

[37] Arnel Development Co. v. City of Costa Mesa (1981) 126 Cal. App. 3d 330, 178 Cal. Rptr. 723.

[38] Arnel Development Co. v. City of Costa Mesa (1981) 126 Cal. App. 3d 330, 336–337, 178 Cal. Rptr. 723.

The *Livermore* test has been used to determine the validity of a variety of land use regulations. For example, the regional welfare test was applied to uphold a city's authority to refuse to extend sewer lines outside city boundaries to a project that did not conform to the city's general plan. The court ruled that land use outside city boundaries is a proper municipal concern under the *Livermore* test.[39] The regional welfare test was also applied to an urbanization plan, adopted by the City of San Diego, which had spillover effects on neighboring Del Mar's environment and public services. The court upheld the plan and also held that regulations that will not have the effect of limiting new housing opportunities should be less suspect under the *Livermore* doctrine than exclusionary regulations.[40] For a discussion of exclusionary zoning, see § 60.62[2].

The *Livermore* test has been found not to apply to modification of a business tax ordinance.[41]

[3] Strict Scrutiny

[a] Discrimination Against Suspect Classes

[i] Test

Any law, including a zoning ordinance, that uses classifications based on the suspect characteristics of race, national origin, or alienage is subject to strict scrutiny and must be justified by a compelling government interest.[42] A regulation that is neutral in language but intentionally discriminates against suspect classes when applied or enforced is also subject to strict scrutiny.[43] A regulation that discriminates on the basis of a quasi-suspect characteristic such as gender or illegitimacy triggers the less rigorous intermediary scrutiny test, requiring a showing of substantial relation to an important governmental interest.[44] Generally, land use regulations have not implicated quasi-suspect classifications.

Although federal law does not recognize poverty alone as a suspect classification,[45] the California Supreme Court has held that poverty may be a suspect class under the

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[39] Dateline Builders, Inc. v. City of Santa Rosa (1983) 146 Cal. App. 3d 520, 528, 531–532, 194 Cal. Rptr. 258.

[40] City of Del Mar v. City of San Diego (1982) 133 Cal. App. 3d 401, 410, 183 Cal. Rptr. 898. *See also* Northwood Homes v. Town of Moraga (1989) 216 Cal. App. 3d 1197, 1203, 265 Cal. Rptr. 363, 365 (open space ordinance upheld under *Livermore* test).

[41] City of Cupertino v. City of San Jose (1995) 33 Cal. App. 4th 1671, 1677–78, 40 Cal. Rptr. 2d 171, 176.

[42] Moore v. City of E. Cleveland (1977) 431 U.S. 494, 500, Cleburne v. Cleburne Living Ctr., Inc. (1985) 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313; Serrano v. Priest (1976) 18 Cal. 3d 728, 761, 135 Cal. Rptr. 345, 557 P.2d 929 (*Serrano II*).

[43] Yick Wo v. Hopkins (1886) 118 U.S. 356, 373–374, 6 S. Ct. 1064, 30 L. Ed. 220; People v. Superior Court of Alameda County (1977) 19 Cal. 3d 338, 348, 138 Cal. Rptr. 66, 562 P.2d 1315.

[44] Cleburne v. Cleburne Living Ctr., Inc. (1985) 473 U.S. 432, 440–441, 105 S. Ct. 3249, 87 L. Ed. 2d 313; Craig v. Boren (1976) 429 U.S. 190, 199–200, 97 S. Ct. 451, 50 L. Ed. 2d 397 (gender); Levy v. Louisiana (1968) 391 U.S. 68, 71, 88 S. Ct. 1509, 20 L. Ed. 2d 436 (illegitimacy).

[45] Harris v. McRae (1980) 448 U.S. 297, 316–318, 100 S. Ct. 2671, 65 L. Ed. 2d 784.

more expansive equal protection principles of the California Constitution.[46] For a discussion of zoning ordinances that discriminate against the poor, see § 60.62[2] (exclusionary zoning).

[ii] De Jure or De Facto Discrimination

Under federal equal protection law, strict scrutiny is only applied against intentional (de jure) discrimination. A regulation with only a disproportionate impact on a suspect class (de facto discrimination) will not trigger heightened scrutiny.[47] Accordingly, a zoning action that has the effect of excluding racial minorities from a community is ordinarily not subject to strict scrutiny if there was no intent to discriminate.[48] The California Supreme Court has implied that discriminatory impact alone may be sufficient in some cases to invalidate a law under the more expansive equal protection provisions in the California Constitution,[49] but this principle has not been applied in any land use cases.

[iii] Discriminatory Purpose or Motive

A zoning ordinance that is neutral on its face may nonetheless be subject to strict scrutiny if it is proven that the actual but unstated purpose of the law is suspect discrimination or that a discriminatory purpose was a motivating factor in passing the law.[50] In *Arlington Heights v. Metro Housing Corp.*,[51] a developer charged that the city's refusal to increase residential density on a parcel to permit a subsidized housing project was racially discriminatory. Although the court found that there was insufficient evidence of racial motivation to merit invalidation of the city's decision, it held that discriminatory intent could be inferred from a clear pattern of disproportionate impact on a suspect class, where that pattern is inexplicable on grounds other than the suspect characteristic and results from the official action.

Discriminatory motive may also be proven by circumstantial evidence showing a general history of official discrimination, departures from usual procedures or ordinary substantive considerations in taking the action, suspicious timing in the sequence of events leading to the action, and statements by public officials regarding legislative

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[46] Serrano v. Priest (1976) 18 Cal. 3d 728, 764–767, 135 Cal. Rptr. 345, 557 P.2d 929 (*Serrano II*); *see* People v. Mitchell (1994) 30 Cal. App. 4th 783, 36 Cal. Rptr. 2d 150; *see also* Hansen v. Workers' Compensation Appeals Bd. (1993) 18 Cal. App. 4th 1179, 1183, 23 Cal. Rptr. 2d 30 ("psychiatric injury" not a suspect class).

[47] Washington v. Davis (1976) 426 U.S. 229, 240, 96 S. Ct. 2040, 48 L. Ed. 2d 597.

[48] Arlington Heights v. Metro. Housing Corp. (1977) 429 U.S. 252, 265, 270, 97 S. Ct. 555, 50 L. Ed. 2d 450.

[49] Serrano v. Priest (1971) 5 Cal. 3d 584, 601–603, 96 Cal. Rptr. 601, 487 P.2d 1241, *cert. denied*, 432 U.S. 907, 97 S. Ct. 2951, 53 L. Ed. 2d 1079 (1976) (*Serrano I*).

[50] Arlington Heights v. Metro Housing Corp. (1977) 429 U.S. 252, 265–266, 97 S. Ct. 555, 50 L. Ed. 2d 450.

[51] Arlington Heights v. Metro Housing Corp. (1977) 429 U.S. 252, 258, 97 S. Ct. 555, 50 L. Ed. 2d 450.

purpose.[52] A historical background of invidious discrimination is a relevant factor; however, standing alone, it does not necessarily create a presumption of purposeful discrimination.[53] The foreseeability and anticipation of disparate impact when the legislation was adopted may also be used to prove discriminatory motivation.[54]

[iv] Burden of Proof

If a government regulation is found to discriminate against a suspect class, the burden shifts to the government to prove that it has a compelling interest that justifies the regulation and that the distinctions drawn by the regulation are necessary to further its purpose.[55] The compelling necessity test is almost always fatal to a government act or enactment, because a finding of compelling necessity is "extremely rare." Once the burden of proof has shifted, it is "almost guaranteed" that the government's action or enactment will be struck down.[56]

[b] Deprivation of Fundamental Rights

Freedom of speech and religion, the right to privacy and personal autonomy, the right to free travel and migration, the right to marry, and the right to vote are all recognized as fundamental rights under the federal and California Constitutions. Zoning regulations that interfere with the enjoyment of these rights may be subject to heightened scrutiny under the due process or equal protection clauses.[57] Freedom of speech, freedom of religion, the right to privacy, and the right to travel are discussed in §§ 60.63–60.66.

Land use regulations also have been found to implicate the right to vote. To trigger strict scrutiny in right to vote cases, a legislative classification must have a "real and

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[52] Arlington Heights v. Metro Housing Corp. (1977) 429 U.S. 252, 266–268, 97 S. Ct. 555, 50 L. Ed. 2d 450; *see* Avenue 6E Investments, LLC v. City of Yuma, Ariz. (9th Cir. 2016) 818 F.3d 493 (city refusal to rezone land against advice of own experts and in the context of a racially charged process, where such application was the only rezoning that the city had denied in the last three years plausibly showed animus); Pacific Shores Properties, LLC v. City of Newport Beach (9th Cir. 2013) 730 F.3d 1142,(evidence showing ordinance limiting group homes in residential neighborhoods created a triable of fact); Litton International Dev. Corp. v. Simi Valley (C.D. Cal. 1985) 616 F. Supp. 275, 286–290 (facts did not show sufficient evidence of racial motivation behind a downzoning); *but see* City of Cuyahoga Falls v. Buckeye Cmty. Hope Found. (2003) 538 U.S. 188, 123 S. Ct. 1389, 155 L. Ed. 2d 349 (city of Cuyahoga Falls did not violate equal protection clause of U.S. Constitution by submitting to voters facially neutral referendum petition that called for repeal of municipal housing ordinance authorizing construction of low-income housing complex; city performed ministerial act in placing referendum on ballot and therefore could not be said to have given effect to voters' allegedly discriminatory motives for supporting petition).

[53] Martin v. Intern. Olympic Comm. (9th Cir. 1984) 740 F.2d 670, 679.

[54] Columbus Bd. of Education v. Penick (1979) 443 U.S. 449, 464, 99 S. Ct. 2941, 61 L. Ed. 2d 666.

[55] Serrano v. Priest (1971) 5 Cal. 3d 584, 597, 96 Cal. Rptr. 601, 487 P.2d 1241, *cert. denied*, 432 U.S. 907, 97 S. Ct. 2951, 53 L. Ed. 2d 1079 (1976) (*Serrano I*).

[56] Litton International Dev. Corp. v. Simi Valley (C.D. Cal. 1985) 616 F. Supp. 275, 284.

[57] *But see* Kawaoka v. City of Arroyo Grande (9th Cir. 1994) 17 F.3d 1227, 1239 (stating that zoning and land use issues do not implicate fundamental rights).

appreciable impact upon the equality, fairness and integrity of the electoral process."[58] In *Hawn v. County of Ventura*,[59] a case in which strict scrutiny was applied, an initiative ordinance gave city voters the right to approve any county airport located in whole or in part within the city. Voters in the unincorporated areas of the county, however, were not given the right to vote on the location of airports or unincorporated land. The court held that the distinction between city and non-city voters was not necessary to further the compelling state interest—the protection of local environmental values—expressed in the ordinance.[60]

Courts have been required to analyze whether additional rights are protected as fundamental under the federal and California Constitutions. Courts generally do not recognize a fundamental constitutional right to pursue a lawful occupation.[61] The United States Supreme Court also has refused to recognize a fundamental right to housing.[62] California courts have not ruled definitively whether housing is a fundamental right under the California Constitution, though housing receives significant protections under state law.

§ 60.62 Common Constitutional Challenges to Zoning

[1] Spot Zoning

[a] Definitions

"Spot zoning" occurs when a single lot or small area is created within a zoning district, and the permitted uses on the lot or small area significantly differ from existing or allowable uses on surrounding parcels.[1] The lot or small area that is treated differently is sometimes called an "island."[2] That treatment may be more or less favorable to the land as compared to the surrounding parcels.[3] Zoning that disfavors the island is sometimes referred to as "reverse spot zoning."[4] It should be noted that some

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[58] Board of Supervisors v. Local Agency Formation Com. (1992) 3 Cal. 4th 903, 905, 13 Cal. Rptr. 2d 245, 838 P.2d 1198.

[59] Hawn v. County of Ventura (1977) 73 Cal. App. 3d 1009, 141 Cal. Rptr. 111.

[60] Hawn v. County of Ventura (1977) 73 Cal. App. 3d 1009, 1020, 141 Cal. Rptr. 111.

[61] Lupert v. California State Bar (9th Cir. 1985) 761 F.2d 1325, 1327 n.2; Subriar v. City of Bakersfield (1976) 59 Cal. App. 3d 175, 201, 130 Cal. Rptr. 853.

[62] Lindsey v. Normet (1972) 405 U.S. 56, 73–74, 92 S. Ct. 862, 31 L. Ed. 2d 36.

[1] *See, e.g.,* Foothill Communities Coalition v. County of Orange (2014) 222 Cal. App. 4th 1302, 1311, 166 Cal. Rptr. 3d 627, 635; Avenida San Juan Partnership v. City of San Clemente (2011) 201 Cal. App. 4th 1256, 1265, 135 Cal. Rptr. 3d 570, 579, *cert. denied* 568 U.S. 819, 133 S. Ct. 156, Hamer v. Town of Ross (1963) 59 Cal. 2d 776, 781–782, 31 Cal. Rptr. 335, 382 P.2d 375; Reynolds v. Barrett (1938) 12 Cal. 2d 244, 251, 83 P.2d 29; Viso v. State of California (1979) 92 Cal. App. 3d 15, 22, 154 Cal. Rptr. 580.

[2] *See, e.g.,* Wilkins v. City of San Bernardino (1946) 29 Cal. 2d 332, 340–342, 175 P.2d 542.

[3] Foothill Communities Coalition v. County of Orange (2014) 222 Cal. App. 4th 1302, 1311, 166 Cal. Rptr. 3d 627, 635

[4] Penn Central Transp. Co. v. City of New York (1978) 438 U.S. 104, 132, 98 S. Ct. 2646, 57 L. Ed. 2d 631.

cases involve the land use patterns characteristic of spot zoning but do not use the nomenclature of spot zoning. Nonetheless, these cases are analyzed using the same principles.[5]

Spot zoning usually involves small parcels of land; the larger the property, the more unlikely that a spot zoning claim will be entertained.[6] Similarly, it is more difficult to establish a spot zoning claim where the spot is not an island but is connected on some sides to a similar zone.[7]

For a spot zoning claim to be entertained, the island must arise from an act of zoning or rezoning, including the denial of a request for rezoning to conform to the surrounding area.[8] The grant or denial of a conditional use permit or a variance, however, does not implicate spot zoning because neither constitutes rezoning.[9] Nor do islands of non-conforming uses implicate spot zoning.[10]

[b] Constitutional Challenges

Spot zoning is subject to challenge on equal protection and due process grounds. Review is based on a rational basis test, and spot zoning may be upheld when there is a rational reason benefitting the public for such a classification.[11] Although the term "spot zoning" originated as a concept meant to imply an illegal special privilege or burden, more recent court trends show that, as long as there is a rational basis for the distinction, the mere size or isolation of a property is not grounds to find a "spot" of rezoning illegal.

In one case, extension of a density restriction that limited residential development to one dwelling unit per 20 acres, and applied only to a single parcel of land, was a constitutional exercise of the city's police power. The density restriction advanced policy goals by effectively freezing the city's urban service boundaries where they were drawn prior to the initial adoption of the restriction in 1990, thereby halting urban

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[5] *See, e.g.,* Arnel Dev. Co. v. City of Costa Mesa (1981) 126 Cal. App. 3d 330, 333–334, 178 Cal. Rptr. 723; Ensign Bickford Realty Corp. v. City Council (1977) 68 Cal. App. 3d 467, 475–476, 137 Cal. Rptr. 304; *but see* G & D Holland Construction Co. v. City of Marysville (1970) 12 Cal. App. 3d 989, 994, 91 Cal. Rptr. 227 (specifically using nomenclature).

[6] Kawaoka v. City of Arroyo Grande (9th Cir. 1994) 17 F.3d 1227, 1237 (17-acre parcel too large to be considered spot zoning); Arcadia Development Co. v. City of Morgan Hill (2011) 197 Cal. App. 4th 1526, 1536–1537, 129 Cal. Rptr. 3d 369 (density restriction that applied only to the parcel of land owned by plaintiff not invalid spot zoning; property was nearly 70 acres in size and was not surrounded by property with less restrictive zoning designations); Viso v. State of California (1979) 92 Cal. App. 3d 15, 22, 154 Cal. Rptr. 580.

[7] Viso v. State of California (1979) 92 Cal. App. 3d 15, 22, 154 Cal. Rptr. 580.

[8] Ross v. City of Yorba Linda (1991) 1 Cal. App. 4th 954, 964, 2 Cal. Rptr. 2d 638.

[9] Kappadahl v. Alcan Pacific Co. (1963) 222 Cal. App. 2d 626, 638, 35 Cal. Rptr. 354.

[10] Safeway Stores, Inc. v. City Council of San Mateo (1948) 86 Cal. App. 2d 277, 281, 194 P.2d 720.

[11] Hamer v. Town of Ross (1963) 59 Cal. 2d 776, 783, 31 Cal. Rptr. 335, 382 P.2d 375; Viso v. State of California (1979) 92 Cal. App. 3d 15, 22, 154 Cal. Rptr. 580.

sprawl and minimizing the potential that adjacent farmland would be urbanized.[12] A spot zoning challenge to a historic landmark law, which was applied only to selected properties, was denied when the landmark law was enacted as part of a comprehensive plan to preserve structures of historic or aesthetic interest.[13]

In another case, the court found that a county had engaged in "spot zoning" when it created a new zoning definition for senior residential housing and applied it to a specific project site. However, the spot zoning was permissible because the creation of the senior residential housing zoning district was in the public interest and was consistent with the county general plan and with the specific plan.[14] Only a few California cases have invalidated zoning classifications exclusively on spot zoning grounds.[15]

Some spot zoning challenges, however, have succeeded when combined with evidence of discriminatory or improper motive. Courts are not willing to extend the usual presumption of constitutional reasonableness to zoning actions that, though legislative in nature, are directed against a single property owner and may be discriminatory. "[T]he principle limiting judicial inquiry into the legislative body's police power objectives does not bar scrutiny of a quite different issue, that of discrimination against a particular parcel of property."[16] Although the motives that influence legislative decisions are generally not subject to scrutiny, legislative motivation may be scrutinized by courts in spot zoning challenges alleging oppression or discrimination.[17] In *Arnel Development Co. v. City of Costa Mesa*,[18] for example, the

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[12] Arcadia Development Co. v. City of Morgan Hill (2011) 197 Cal. App. 4th 1526, 1538, 129 Cal. Rptr. 3d 369.

[13] Penn Central Transp. Co. v. City of New York (1978) 438 U.S. 104, 132, 98 S. Ct. 2646, 57 L. Ed. 2d 631 & n.28, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631.

[14] Foothill Communities Coalition v. County of Orange (2014) 222 Cal. App. 4th 1302, 1314–1315, 166 Cal. Rptr. 3d 627.

[15] *See, e.g.,* Avenida San Juan Partnership v. City of San Clemente (2011) 201 Cal. App. 4th 1256, 1265, 135 Cal. Rptr. 3d 570, 579, *cert. denied* 568 U.S. 819, 133 S. Ct. 156 (down zoning of land to one house per 20 acres surrounded by properties in a two to six houses per acre sea was improper); Hamer v. Town of Ross (1963) 59 Cal. 2d 776, 783, 31 Cal. Rptr. 335, 382 P.2d 375 (one-acre minimum lot size requirement on island surrounded by developed lots of less than one acre invalidated); Reynolds v. Barrett (1938) 12 Cal. 2d 244, 251, 83 P.2d 29 (residential zoning island surrounded by nonresidential uses invalidated); Ross v. City of Yorba Linda (1991) 1 Cal. App. 4th 954, 970, 2 Cal. Rptr. 2d 638 (neighborhood opposition insufficient to justify one-acre minimum lot size requirement on island surrounded by developed lots of less than one acre); Arnel Dev. Co. v. City of Costa Mesa (1981) 126 Cal. App. 3d 330, 340, 178 Cal. Rptr. 723 (down zoning of island for sole purpose of defeating planned development improper); Kissinger v. City of Los Angeles (1958) 161 Cal. App. 2d 454, 465, 327 P.2d 10 (down zoning of island surrounded by multifamily residential and commercial uses to single family use improper).

[16] G & D Holland Construction Co. v. City of Marysville (1970) 12 Cal. App. 3d 989, 994, 91 Cal. Rptr. 227.

[17] *See, e.g.,* Toso v. City of Santa Barbara (1980) 101 Cal. App. 3d 934, 945, 162 Cal. Rptr. 210; Friedman v. City of Fairfax (1978) 81 Cal. App. 3d 667, 678–679, 146 Cal. Rptr. 687 (zoning regulation designed to preserve existing open-space use of parcel had legitimate public purpose "untainted by improper motives"); G & D Holland Construction Co. v. City of Marysville (1970) 12 Cal. App. 3d 989,

court permitted the use of ballot arguments for a challenged zoning initiative as evidence to show discriminatory purpose.

[2] Exclusionary Zoning

[a] Definition

"Exclusionary zoning" is zoning that excludes certain types of uses from a community. The term is commonly used to describe zoning regulations that affluent suburban communities use to exclude multifamily housing developments affordable to lower income households. It has been used, however, to describe any regulation that excludes a particular use from a community.[19]

[b] Exclusion of Affordable Residential Uses

Challenges to exclusionary zoning often arise when an ordinance has the effect of excluding lower income households. Although few zoning ordinances explicitly classify on the basis of wealth, zoning controls can have the effect of excluding lower income groups by, for example, requiring larger lot sizes or precluding the development of multifamily projects. Ordinances of this kind have been challenged under the due process and equal protection clauses.

A zoning scheme that excludes a particular group, even if the exclusion is intentional, is not unconstitutional per se. The Ninth Circuit has noted that practically all zoning restrictions, either by intent or in effect, exclude some activity, some type of structure, or certain inhabitants. The court stated that "in reviewing the reasonableness of a zoning ordinance, our inquiry does not terminate with a finding that it is for an exclusionary purpose."[20] Indeed, since federal law does not recognize poverty alone as a suspect classification,[21] or housing as a fundamental right,[22] zoning ordinances that discriminate against the poor by design or effect are usually reviewed under the deferential rational basis standard.[23] The California Supreme Court, however, has held that poverty may be a suspect class under the more expansive equal protection principles of the California Constitution.[24]

994, 91 Cal. Rptr. 227; Kissinger v. City of Los Angeles (1958) 161 Cal. App. 2d 454, 460, 327 P.2d 10; *but see* Ensign Bickford Realty Corp. v. City Council (1977) 68 Cal. App. 3d 467, 478, 137 Cal. Rptr. 304 (motive is not relevant to discriminatory zoning claim).

[18] Arnel Dev. Co. v. City of Costa Mesa (1981) 126 Cal. App. 3d 330, 335–336, 178 Cal. Rptr. 723.

[19] *See* CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 261, *Types of Zoning Controls*, § 261.25 (Matthew Bender).

[20] Construction Industry Asso. v. Petaluma (9th Cir. 1975) 522 F.2d 897, 906, *cert. denied*, 424 U.S. 934, 96 S. Ct. 1148, 47 L. Ed. 2d 342 (1976).

[21] Harris v. McRae (1980) 448 U.S. 297, 316–318, 100 S. Ct. 2671, 65 L. Ed. 2d 784.

[22] Lindsey v. Normet (1972) 405 U.S. 56, 73–74, 92 S. Ct. 862, 31 L. Ed. 2d 36.

[23] *See, e.g.,* Ybarra v. Town of Los Altos Hills (9th Cir. 1974) 503 F.2d 250, 254; *but see* Southern Alameda Span. Sp. Org. v. City of Union City, Cal. (9th Cir. 1970) 424 F.2d 291, 295–296 (dicta).

[24] Serrano v. Priest (1976) 18 Cal. 3d 728, 764–767, 135 Cal. Rptr. 345, 557 P.2d 929 (*Serrano II*); *see also* People v. Mitchell (1994) 30 Cal. App. 4th 783, 36 Cal. Rptr. 2d 150.

Several challenges to exclusionary zoning have been based on the theory that such zoning violates the fundamental right to travel.[25] These challenges have failed to trigger strict scrutiny, however, because the courts have found that the ordinances in question have only an indirect burden on the right to travel.[26]

Challenges to zoning policies that disadvantage the poor usually fail under rational basis scrutiny. Courts have upheld large lot and large structure zoning ordinances,[27] as well as growth control ordinances limiting new residential zoning or development.[28] A zoning ordinance that totally excludes multifamily housing from a community, however, would likely run afoul of the *Livermore* regional welfare doctrine,[29] affordable housing policies,[30] and general plan housing element requirements.[31]

A constitutional attack on a zoning decision that excludes a specific housing project for the poor has a greater chance of success than challenges to zoning policies that disadvantage lower income households. Thus, the rezoning of property to allow only single-family residential use was held to be discriminatory and invalid because the property was rezoned solely to exclude a proposed housing project.[32]

Group homes are also often the target of exclusionary zoning policies. A zoning ordinance that excluded a home for the mentally disabled was invalidated on equal protection grounds by the United States Supreme Court.[33] In California, state law

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[25] *See, e.g.,* Construction Industry Asso. v. Petaluma (9th Cir 1975) 522 F.2d 897, 904–905, *cert. denied*, 424 U.S. 934, 96 S. Ct. 1148, 47 L. Ed. 2d 342 (1976) (local parties have no standing to assert right to travel theory on behalf of non-resident third parties); Associated Home Builders Etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 602–604, 135 Cal. Rptr. 41, 557 P.2d 473; *see also* § 60.66 (right to travel).

[26] Associated Home Builders Etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 602–604, 135 Cal. Rptr. 41, 557 P.2d 473.

[27] Ybarra v. Town of Los Altos Hills (9th Cir. 1974) 503 F.2d 250, 254; Confederacion de la Raza Unida v. Morgan Hill (N.D. Cal. 1971) 324 F. Supp. 895, 898; 55 Ops. Cal. Atty. Gen. 133 (1972).

[28] Associated Home Builders Etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 623, 135 Cal. Rptr. 41, 557 P.2d 473; Builders Assn. of Santa Clara-Santa Cruz Counties v. Superior Court (1974) 13 Cal. 3d 225, 233, 118 Cal. Rptr. 158, 529 P.2d 582, *appeal dismissed*, 427 U.S. 901, 96 S. Ct. 3184, 49 L. Ed. 2d 1195 (1976); Construction Industry Asso. v. Petaluma (9th Cir. 1975) 522 F.2d 897, 909, *cert. denied*, 424 U.S. 934, 96 S. Ct. 1148, 47 L. Ed. 2d 342 (1976).

[29] Associated Home Builders Etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 135 Cal. Rptr. 41, 557 P.2d 473; *see* § 60.61[2][d].

[30] *See* § 60.90, *below*.

[31] *See* Ch. 62, *Planning*.

[32] Arnel Dev. Co. v. City of Costa Mesa (1981) 126 Cal. App. 3d 330, 337, 178 Cal. Rptr. 723; *see* G & D Holland Construction Co. v. City of Marysville (1970) 12 Cal. App. 3d 989, 993, 996, 91 Cal. Rptr. 227 (claim that rezoning was solely to frustrate a specific housing project presented triable issue of fact not suitable for resolution by summary judgment); *see also* § 60.62[1], *above* (spot zoning).

[33] Cleburne v. Cleburne Living Center, Inc. (1985) 473 U.S. 432, 450, 105 S. Ct. 3249, 87 L. Ed. 2d 313; *see* J.W. v. City of Tacoma, Wash. (9th Cir. 1983) 720 F.2d 1126, 1131–1132.

prohibits discrimination against certain types of housing—such as group homes—found to be deserving of protection by the state Legislature.[34]

Reasonable distinctions between similar types of residential uses are generally upheld. For example, California courts have upheld zoning ordinances that (1) separate mobile homes from other forms of single-family housing[35] and (2) exclude fraternities from a multifamily zone while permitting boarding houses and other group homes.[36] Distinctions between residential uses may be found unconstitutional, however, if the distinction is based on factors that implicate constitutionally protected rights, such as the right to privacy.[37] For a discussion of the right to privacy, see § 60.65.

[c] Exclusion of Commercial Uses

A community may exclude any or all commercial uses if the exclusion reasonably relates to the public health, safety, morals, or general welfare.[38] For example, an ordinance that prohibits commercial recreational uses while allowing nonprofit recreational uses has been upheld.[39] A challenge to an ordinance limiting the size of commercial big box retailers was also upheld.[40] Also upheld was a town ordinance that excludes transient commercial uses, such as bed and breakfast inns, from areas zoned residential while allowing at-home commercial uses such as crafts studios.[41]

The use of the zoning power to exclude commercial uses is, however, subject to some limits. For example, although a city may entirely prohibit all billboards,[42] zoning that regulates outdoor advertising or adult entertainment is subject to limitation by the protections of the First Amendment.[43] In addition, the *Livermore* regional general welfare doctrine[44] may serve to limit the power of a locality to exclude certain commercial uses, although no case has yet applied *Livermore* to commercial zoning. If the welfare of a region depends on ready access to a certain commercial activity, then local zoning may be obligated to recognize and provide for that commercial use as part of its duty to consider the regional welfare.

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[34] *See, e.g.,* Gov. Code § 65008.

[35] McKie v. County of Ventura (1974) 38 Cal. App. 3d 555, 557, 113 Cal. Rptr. 143.

[36] City of Long Beach v. California Lambda Etc. Fraternity (1967) 255 Cal. App. 2d 789, 796–798, 63 Cal. Rptr. 419.

[37] City of Santa Barbara v. Adamson (1980) 27 Cal. 3d 123, 131–133, 164 Cal. Rptr. 539, 610 P.2d 436.

[38] Town of Los Altos Hills v. Adobe Creek Properties, Inc. (1973) 32 Cal. App. 3d 488, 518, 108 Cal. Rptr. 271.

[39] Town of Los Altos Hills v. Adobe Creek Properties, Inc. (1973) 32 Cal. App. 3d 488, 518, 108 Cal. Rptr. 271.

[40] Wal-Mart Stores, Inc. v. City of Turlock (E.D. Cal. 2006) 483 F.Supp. 2d 987.

[41] Ewing v. City of Carmel-by-the-Sea (1991) 234 Cal. App. 3d 1579, 1592–1593, 286 Cal. Rptr. 382.

[42] Metromedia, Inc. v. City of San Diego (1980) 26 Cal. 3d 848, 864, 164 Cal. Rptr. 510, 610 P.2d 407, *rev'd on other grounds*, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981).

[43] *See* § 60.63, *below*.

[44] Associated Home Builders Etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 135 Cal. Rptr. 41, 557 P.2d 473; *see* § 60.61[2][d].

[d] Discrimination Against Disabilities

The prohibitions against discrimination in the Americans with Disabilities Act (ADA)[45] and the Rehabilitation Act[46] apply to zoning decisions.[47] The ADA provides that "subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[48]

In *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch*,[49] the Ninth Circuit found that this language constitutes a general prohibition against discrimination by public entities. It rejected the contention that 42 U.S.C. § 12132 did not apply to zoning because zoning is not a "service, program or activity." The court noted that the Rehabilitation Act broadly defines "program or activity" to include "all of the operations of" a qualifying local government.[50] The court concluded that the Rehabilitation Act and the ADA apply to zoning because zoning "is a normal function of a governmental entity."[51]

The court then found that the challenged ordinance, which prohibited the issuance of permits to, or operation of, certain substance abuse clinics located within 500 feet of any residential property, was discriminatory on its face.

In *Pacific Shores Properties v. City of Newport Beach*,[52] the Ninth Circuit held that the district court erred in granting summary judgment to the city in an action contending that the city violated the Fair Housing Act[53] and the ADA by enacting an ordinance that was intended to exclude group homes for recovering alcoholics and drug users from residential neighborhoods. Plaintiffs' evidence showed that the city's purpose in enacting the ordinance was to exclude group homes from most residential districts and to bring about the closure of existing group homes in those areas.[54]

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[45] 42 U.S.C. § 12131 et seq.

[46] 29 U.S.C. § 794.

[47] Bay Area Addiction Research and Treatment, Inc. v. City of Antioch (9th Cir. 1999) 179 F.3d 725, 731.

[48] 42 U.S.C. § 12132. Section 504 of the Rehabilitation Act is similar to 42 U.S.C. § 12132. *See* 29 U.S.C. § 794(b)(1)(A). Congress has directed that the two statutes should be construed consistently. Bay Area Addiction Research and Treatment, Inc. v. City of Antioch (9th Cir. 1999) 179 F.3d 725, 731.

[49] Bay Area Addiction Research and Treatment, Inc. v. City of Antioch (9th Cir. 1999) 179 F.3d 725, 731.

[50] 29 U.S.C. § 794(b)(1)(A); Bay Area Addiction Research and Treatment, Inc. v. City of Antioch (9th Cir. 1999) 179 F.3d 725, 731.

[51] Bay Area Addiction Research and Treatment, Inc. v. City of Antioch (9th Cir. 1999) 179 F.3d 725, 731.

[52] Pacific Shores Properties v. City of Newport Beach (9th Cir. 2013) 730 F.3d 1142.

[53] *See* 42 U.S.C. § 3604(f)(1) (unlawful "to discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap").

[54] Pacific Shores Properties v. City of Newport Beach (9th Cir. 2013) 730 F.3d 1142, 1163.

[3] Anticompetitive Zoning

Under traditional substantive due process analysis, zoning that created a business monopoly or regulated economic competition was seen as an unreasonable, and therefore unconstitutional, exercise of the police power.[55] Although this principle is still occasionally restated, it has lost much of its practical force for two reasons.

First, courts now hold that local police powers may be exercised in pursuit of economic objectives such as economic stability, protection of tax revenues, and maintenance of property values.[56] The primary purpose of the zoning cannot be the regulation of economic competition; rather, it must be the reasonable regulation of land use.[57] This does not mean, however, that a zoning ordinance is valid only when the ordinance has merely an "indirect impact" on economic competition, and never when the regulation of economic competition is a direct and intended effect of the ordinance.[58] Second, most zoning measures may be justified as promoting the "public welfare" even if they have significant anticompetitive effects.

Under these principles, zoning with anticompetitive effects is likely to be upheld. For example, a city may restrict commercial zoning of developable land to one part of town to influence the location of future growth.[59] A city may also restrict commercial development in outlying areas to encourage the redevelopment of its downtown.[60] A county may also regulate the location of medical marijuana dispensaries differently from pharmacies because of divergent public welfare interests.[61] However, a city cannot bar pharmacies from selling cigarettes but allow larger stores containing pharmacies to sell them.[62]

Attempts by communities to restrict or limit "big box" retail stores, such as Wal-Mart, Costco or Lowes often raise these legal issues. Regulations limiting chain

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[55] Pacific Palisades Asso. v. Huntington Beach (1925) 196 Cal. 211, 216, 237 P. 538; In re White (1925) 195 Cal. 516, 520–521, 234 P. 396; *but see* Safeway Stores, Inc. v. City Council of San Mateo (1948) 86 Cal. App. 2d 277, 288, 194 P.2d 720 (requiring showing that zones in which businesses can operate are so constricted as to show an intent to shut out newcomers).

[56] Van Sicklen v. Browne (1971) 15 Cal. App. 3d 122, 128, 92 Cal. Rptr. 786.

[57] Hernandez v. City of Hanford (2007) 41 Cal. 4th 279, 59 Cal. Rptr. 3d 442, 159 P.3d 33 (ordinance prohibiting furniture sales in commercial district by all stores except large department stores was valid because it had primary purpose of preservation of municipality's downtown business district for benefit of municipality as a whole); Van Sicklen v. Browne (1971) 15 Cal. App. 3d 122, 128, 92 Cal. Rptr. 786.

[58] Hernandez v. City of Hanford (2007) 41 Cal. 4th 279, 59 Cal. Rptr. 3d 442, 159 P.3d 333, disapproving Van Sicklen v. Browne (1971) 15 Cal. App. 3d 122, 92 Cal. Rptr. 786, Ensign Bickford Realty Corp. v. City Council (1977) 68 Cal. App. 3d 467, 137 Cal. Rptr. 304, and Wal Mart Stores, Inc. v. City of Turlock (2006) 138 Cal. App. 4th 273, 41 Cal. Rptr. 3d 420, to the extent language in those cases could be read to suggest otherwise.

[59] Ensign Bickford Realty Corp. v. City Council (1977) 68 Cal. App. 3d 467, 477–478, 137 Cal. Rptr. 304.

[60] Carty v. City of Ojai (1978) 77 Cal. App. 3d 329, 338, 143 Cal. Rptr. 506.

[61] County of Los Angeles v. Hill (2011) 192 Cal. App. 4th 861, 121 Cal. Rptr. 3d 722.

[62] Walgreen Co. v. City and County of San Francisco (2010) 185 Cal. App. 4th 424, 438, 110 Cal. Rptr. 3d 498, 509.

stores are often motivated by dislike of the physical appearance of these uses (large, single story buildings with few windows and large seas of parking or commercialized signage), but also by their impact on small businesses. So long as the regulations are not arbitrary and are reasonably related to public welfare and policies that identify the jurisdiction's goals, they will be upheld.[63]

Zoning ordinances that raise anticompetitive issues often raise statutory antitrust questions as well. For discussion of antitrust statutes as limits on the zoning power, see § 60.72.

[4] Manipulation of Land Values Through Zoning

Zoning is not constitutionally reasonable when the government uses it to avoid paying fair compensation to landowners in condemnation proceedings. Property owners have successfully brought due process and equal protection challenges to down-zonings imposed simply to reduce the property's market value.[64] Mere public dialogue regarding condemnation without official action to acquire the property, however, is insufficient to sustain a claim of improper manipulation of land values.[65]

The general rule requires that the locality's motive in passing an ordinance is irrelevant to any inquiry regarding whether it was passed in an effort to depress land values.[66] In *McCarthy v. City of Manhattan Beach*,[67] for example, the Court rejected the claim that the city refused to rezone a property from recreational to residential as part of a scheme to depress the property's value. The Court held that evidence of improper fiscal motives was irrelevant because there was a rational public welfare basis for the city's decision.[68] However, when fiscal manipulation is combined with a claim of discriminatory spot zoning, scrutiny of legislative motives may be permitted.[69]

[5] Vague Zoning Standards

Statutes and regulations must be definite enough to provide a standard of conduct for those whose activities are governed by them and a standard by which agencies can

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[63] Wal-Mart Stores, Inc. v. City of Turlock (E.D. 2006) 483 F. Supp. 2d 987; Hernandez v. City of Hanford (2007) 41 Cal. 4th 279, 59 Cal. Rptr. 3d 442.

[64] *See, e.g.,* People ex rel. Dept. of Public Works v. Southern Pac. Trans. Co. (1973) 33 Cal. App. 3d 960, 965–966, 109 Cal. Rptr. 525; Kissinger v. City of Los Angeles (1958) 161 Cal. App. 2d 454, 460–462, 327 P.2d 10; Griffin v. County of Marin (1958) 157 Cal. App. 2d 507, 510–511, 321 P.2d 148.

[65] Friedman v. City of Fairfax (1978) 81 Cal. App. 3d 667, 678, 146 Cal. Rptr. 687.

[66] McCarthy v. City of Manhattan Beach (1953) 41 Cal. 2d 879, 893–894, 264 P.2d 932; Viso v. State of California (1979) 92 Cal. App. 3d 15, 23, 154 Cal. Rptr. 580.

[67] McCarthy v. City of Manhattan Beach (1953) 41 Cal. 2d 879, 264 P.2d 932.

[68] McCarthy v. City of Manhattan Beach (1953) 41 Cal. 2d 879, 893–894, 264 P.2d 932.

[69] *See, e.g.,* Kissinger v. City of Los Angeles (1958) 161 Cal. App. 2d 454, 462, 327 P.2d 10; *see* § 60.62[1], *above* (spot zoning).

properly administer them.[70] Laws that fail to provide such "fair notice or warning" are unconstitutionally vague under the due process clause.[71]

A zoning ordinance may be challenged as void on the basis of vagueness if the ordinance as a whole lacks specific standards to guide administrative decision-making and provide certainty to landowners. California courts, however, generally uphold laws that broadly delegate authority to administrative bodies over land use matters, such as variance requests[72] and design review,[73] with the sole requirement that the administrative body make its decisions in accord with the general welfare. The courts permit a substantial amount of vagueness in California zoning ordinances "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."[74] When zoning ordinances implicate First Amendment rights, however, the courts require greater specificity in the ordinance.[75] For a discussion of delegation of authority, see § 60.69, and for a discussion of First Amendment protections, see § 60.63.

Specific terms in a zoning ordinance may also be challenged as too general or ambiguous to provide meaningful guidance. Like statutes, an ordinance is sufficiently certain for constitutional purposes if its meaning is reasonably clear from general experience, established usage in the field, common law, prior interpretation, or its legislative history or purpose.[76] California cases have upheld against vagueness challenges such undefined terms as "promotion of the public health, safety, comfort, convenience and general welfare,"[77] "substantial adverse environmental or ecological effect,"[78] "residential use,"[79] and "housing project."[80] Similarly, courts have upheld

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[70] People v. McCaughan (1957) 49 Cal. 2d 409, 414, 317 P.2d 974; McMurtry v. State Board of Medical Examiners (1960) 180 Cal. App. 2d 760, 766, 4 Cal. Rptr. 910.

[71] *See, e.g.,* Smith v. Goguen (1974) 415 U.S. 566, 572–573, 582, 94 S. Ct. 1242, 39 L. Ed. 2d 605; People v. Superior Court (1977) 19 Cal. 3d 338, 345, 138 Cal. Rptr. 66, 562 P.2d 1315.

[72] Matthews v. Board of Supervisors (1962) 203 Cal. App. 2d 800, 803, 21 Cal. Rptr. 914.

[73] Novi v. City of Pacifica (1985) 169 Cal. App. 3d 678, 682, 215 Cal. Rptr. 439.

[74] Novi v. City of Pacifica (1985) 169 Cal. App. 3d 678, 682, 215 Cal. Rptr. 439 (internal quotation marks and citation omitted).

[75] *See, e.g.,* E.W.A.P., Inc. v. City of Los Angeles (1997) 56 Cal. App. 4th 310, 320, 65 Cal. Rptr. 2d 325.

[76] *See* McMurtry v. State Board of Medical Examiners (1960) 180 Cal. App. 2d 760, 766–767, 4 Cal. Rptr. 910.

[77] City & County of San Francisco v. Superior Court (1959) 53 Cal. 2d 236, 250, 1 Cal. Rptr. 158, 347 P.2d 294; Simi Valley Rec. & Park Dist. v. Local Agency Formation Com. (1975) 51 Cal. App. 3d 648, 672, 124 Cal. Rptr. 635.

[78] CEEED v. California Coastal Zone Conservation Com. (1974) 43 Cal. App. 3d 306, 327, 118 Cal. Rptr. 315.

[79] Sechrist v. Municipal Court (1976) 64 Cal. App. 3d 737, 745–746, 134 Cal. Rptr. 733.

[80] Case v. City of Los Angeles (1963) 218 Cal. App. 2d 36, 41–42, 32 Cal. Rptr. 271.

against vagueness challenges a view protection ordinance,[81] a noise ordinance,[82] a neighborhood compatibility ordinance requiring that a new structure's design respect the existing privacy of surrounding uses,[83] and an ordinance regulating home occupations in single-family residential zones.[84]

§ 60.63 Freedom of Speech

[1] General Doctrine

The right to freedom of speech is protected by U.S. Const. amend. I, and Cal. Const. art. I, § 2. Freedom of speech has been applied to the states through U.S. Const. amend. XIV.[1] Although the state and federal constitutional provisions are similar, the California Constitution provides greater protection to free speech than the federal constitution and prevails over federal law when federal law affords less protection.[2]

Zoning regulations may trigger the constitutional guarantee of free speech whenever they limit some type of expression, as in attempts to regulate outdoor advertising,[3] murals,[4] handbills, newsracks, outdoor vending,[5] or sexually oriented businesses.[6] Zoning ordinances that restrict speech must be tested against established First Amendment principles, with the strictness of the court's review dependent on whether the regulation at issue is intended to suppress all expression or simply to control the time, place, or manner in which views may be expressed. Laws enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment. In contrast, "content-neutral" time, place, and manner restrictions are judged under the "rational basis" test and are acceptable so long as they serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication.[7] If regulations are based on the content of speech or impose a total ban on expression, the "strict scrutiny" test applies, and the government bears the burden of proving that they are narrowly drawn to accomplish a compelling governmental interest.[8]

Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves

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[81] Ross v. City of Rolling Hills Estates (1987) 192 Cal. App. 3d 370, 374–376, 238 Cal. Rptr. 561.

[82] Mann v. Mack (1984) 155 Cal. App. 3d 666, 676, 202 Cal. Rptr. 296, 303.

[83] Briggs v. City of Rolling Hills Estates (1995) 40 Cal. App. 4th 637, 643, 47 Cal. Rptr. 2d 29.

[84] City of Los Altos v. Barnes (1992) 3 Cal. App. 4th 1193, 1202–1203, 5 Cal. Rptr. 2d 77.

[1] Gitlow v. New York (1925) 268 U.S. 652, 654, 45 S. Ct. 625, 69 L. Ed. 1138.

[2] Gonzales v. Superior Court (1986) 180 Cal. App. 3d 1116, 1122–1123, 226 Cal. Rptr. 164.

[3] *See* § 60.63[2], *below*.

[4] *See* § 60.63[2], *below*.

[5] *See* § 60.63[3], *below*.

[6] *See* § 60.63[4], *below*.

[7] Renton v. Playtime Theatres, Inc. (1986) 475 U.S. 41, 46–47, 106 S. Ct. 925, 89 L. Ed. 2d 29.

[8] Perry Education Ass'n v. Perry Local Educators' Ass'n (1983) 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794; Gonzales v. Superior Court (1986) 180 Cal. App. 3d 1116, 1125, 226 Cal. Rptr. 164.

that they are narrowly tailored to serve compelling state interests.[9] A regulation is "content based" if it "applies to particular speech because of the topic discussed or the idea or message expressed."[10]

The test for governing commercial speech was set out by the U.S. Supreme Court in *Central Hudson Gas & Elec. Corp.* A governmental restriction on commercial speech does not violate the First Amendment if:

- it concerns lawful activity and is not misleading;
- the government interest to be served by the restriction on the speech is substantial;
- it directly advances the government interest that is promoted; and
- it is not more extensive than necessary to serve that interest.[11]

There are a number of areas in which zoning regulations and First Amendment guarantees often conflict, including regulation of outdoor displays[12] and adult entertainment uses.[13] Regulations limiting newsracks, handbills, and outdoor merchandising have also been challenged on the basis of the free speech guarantee.[14] In these areas, zoning ordinances are likely to be ostensibly based on interests other than the content of speech, such as traffic safety or protecting the aesthetic or commercial quality of a neighborhood, yet they limit free speech.

[2] Regulation of Outdoor Displays

[a] *Metromedia, Inc. v. San Diego*

Zoning restrictions on signs, billboards, and murals are generally based on interests in aesthetics and traffic safety. Either or both of these interests may be a sufficient basis for zoning regulations that impinge on freedom of speech.[15] The validity of these ordinances depends on the means they employ and the distinctions they make between types of speech.[16]

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[9] R.A.V. v. St. Paul (1992) 505 U.S. 377, 395, 112 S. Ct. 2538, 2550.

[10] Reed v. Town of Gilbert, Ariz. (2015) 576 U.S. 155, 163, 135 S. Ct. 2218, 2227.

[11] Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York (1980) 447 U.S. 557, 562–67; 100 S. Ct. 2343, 2349–51.

[12] *See* § 60.63[2], *below*.

[13] *See* § 60.63[4], *below*.

[14] *See* § 60.63[3], *below*.

[15] Lamar Central Outdoor, LLV v. City of Los Angeles (2016) 245 Cal. App. 4th 610, 623–30, 199 Cal. Rptr. 3d 620, 629–35; City Council v. Taxpayers for Vincent (1984) 466 U.S. 789, 806–807, 104 S. Ct. 2118, 80 L. Ed. 2d 772; City & County of San Francisco v. Eller Outdoor Advertising (1987) 192 Cal. App. 3d 643, 659, 237 Cal. Rptr. 815; *see* Rodriguez v. Solis (1991) 1 Cal. App. 4th 495, 514–516, 2 Cal. Rptr. 2d 50 (upholding city's denial of permits for free standing advertising signs on business premises along landscaped freeway); Crown Motors v. City of Redding (1991) 232 Cal. App. 3d 173, 178–179, 283 Cal. Rptr. 356 (emergency ordinance prohibiting electronic billboards could be based on public health grounds, which can encompass aesthetic concerns).

[16] For a discussion of constitutional protection of religious displays, see § 60.64[4][b].

The leading case on the constitutional issues involved in the regulation of outdoor advertising is *Metromedia, Inc. v. San Diego*.[17] In this case, a majority of the Supreme Court struck down a billboard ordinance that banned all outdoor, fixed-structure advertising but excepted (1) onsite signs identifying commercial goods and services, and (2) certain offsite noncommercial advertising such as political campaign signs. The ordinance distinguished speech both on the basis of location (allowing commercial speech onsite but not off, and allowing some noncommercial speech offsite but not on) and content (allowing onsite commercial but not noncommercial signs, and allowing only certain types of offsite noncommercial speech).

The Court reviewed the ordinance's regulation of commercial speech by less stringent standards than its regulation of noncommercial speech, citing prior holdings that commercial speech (1) occupies a subordinate position among First Amendment values, (2) is entitled to a lesser degree of protection than noncommercial speech, and (3) may be regulated in situations in which noncommercial speech may not.[18] The Court upheld the city's power to ban all offsite commercial outdoor signs while allowing them onsite because of the greater interest in identifying locations where goods and services were actually offered. The prohibition of offsite signs was directly related to the city's objective of traffic safety and aesthetics, and the Court accepted the city's conclusion that its interests should prevail over the interest in offsite advertising but not over the stronger interest in onsite advertising.[19]

The ordinance was unconstitutional, however, in disallowing onsite noncommercial advertising (such as political signs) and allowing only certain kinds of offsite noncommercial advertising. The different treatment of onsite commercial and noncommercial speech served to invert First Amendment values by giving greater protection to commercial than noncommercial speech.[20] The distinction between types of offsite noncommercial speech impermissibly allowed the city to choose acceptable types of speech.[21]

[b] Cases Following *Metromedia*

In keeping with *Metromedia, Inc. v. San Diego*,[22] a California court struck down an ordinance that prohibited posting certain temporary noncommercial signs while allowing permanent commercial signs. This selective ban unconstitutionally allowed

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[17] Metromedia, Inc. v. City of San Diego (1981) 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800.

[18] Metromedia, Inc. v. City of San Diego (1981) 453 U.S. 490, 505–506, 101 S. Ct. 2882, 69 L. Ed. 2d 800.

[19] Metromedia, Inc. v. City of San Diego (1981) 453 U.S. 490, 511–512, 101 S. Ct. 2882, 69 L. Ed. 2d 800; *see* City Council v. Taxpayers for Vincent (1984) 466 U.S. 789, 810–811, 104 S. Ct. 2118, 80 L. Ed. 2d 772.

[20] Metromedia, Inc. v. City of San Diego (1981) 453 U.S. 490, 513, 101 S. Ct. 2882, 69 L. Ed. 2d 800.

[21] Metromedia, Inc. v. City of San Diego (1981) 453 U.S. 490, 514–515, 101 S. Ct. 2882, 69 L. Ed. 2d 800.

[22] Metromedia, Inc. v. City of San Diego (1981) 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800; *see* § 60.63[2][a], *above*.

the city to pick and choose permissible subjects for public debate.[23] The Ninth Circuit upheld a City of Los Angeles ordinance which prohibited most off-site advertising but excluded advertising at city owned transit stops.[24] The Ninth Circuit also upheld a City of Los Angeles ordinance limiting freeway facing billboards located within 2,000 feet of and viewed primarily from a freeway, though excepting certain areas of town such as an entertainment districts and certain existing signs.[25] The ordinance also banned certain supergraphic signs, though particular exceptions did apply.[26]

An ordinance that allowed onsite but not offsite signs without distinguishing permissible signs on the basis of content was upheld.[27] However, a city ordinance regulating on-site and offsite signs and billboards was struck down. It contained no limits on the authority of city officials to deny a permit, there was no showing that the ordinance furthered any substantial governmental interest, it imposed greater restrictions on noncommercial than on commercial billboards, and it regulated noncommercial billboards based on their content.[28]

A San Francisco ordinance distinguishing between commercial and noncommercial signs did not violate the First Amendment. The distinctions made by the ordinance related empirically to the interests in safety and aesthetics that the city sought to advance.[29] There was no constitutional infirmity in the ordinance's failure to regulate every sign that it might have reached if the city or its voters instead had enacted a more expansive law that exhausted the full breadth of its legal authority.[30]

Three years after *Metromedia*, the Supreme Court upheld an ordinance prohibiting the posting of all signs on public property both on its face and as applied to political posters attached to utility pole crosswires. Because the ordinance concerned all signs, regardless of content, the Court applied the test for content-neutral regulations, finding that the ordinance was justified by a substantial governmental interest—preserving or improving the quality of life by controlling visual blight—and did not restrict expression further than necessary to satisfy this interest. The Court also found that ample alternative modes of communication existed.[31] In another case, the Supreme Court applied the content-neutral test to determine the validity of an ordinance that

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[23] Gonzales v. Superior Court (1986) 180 Cal. App. 3d 1116, 1120, 1126, 226 Cal. Rptr. 164; *see* Tahoe Regional Planning Agency v. King (1991) 233 Cal. App. 3d 1365, 1406–1409, 285 Cal. Rptr. 335 (selective off-site sign exception for political signs invalidated, but severed from non-selective on-site signage regulation).

[24] Metro Lights, LLC v. City of Los Angeles (9th Cir. 2009) 551 F.3d 898.

[25] World Wide Rush, LLC v. City of Los Angeles (9th Cir. 2010) 606 F.3d 676.

[26] World Wide Rush, LLC v. City of Los Angeles (9th Cir. 2010) 606 F.3d 676.

[27] City & County of San Francisco v. Eller Outdoor Advertising (1987) 192 Cal. App. 3d 643, 660–661, 237 Cal. Rptr. 815.

[28] Desert Outdoor Advertising v. City of Moreno Valley (9th Cir. 1996) 103 F.3d 814, 819.

[29] Contest Promotions, LLC v. City & Cty. of San Francisco (9th Cir. 2017) 874 F.3d 597, 603.

[30] Contest Promotions, LLC v. City & Cty. of San Francisco (9th Cir. 2017) 874 F.3d 597, 604.

[31] City Council of the City of Los Angeles v. Taxpayers for Vincent (1984) 466 U.S. 789, 806, 104 S. Ct. 2118, 80 L. Ed. 2d 772.

prohibited virtually all residential signs on the basis of aesthetics. The Court held that the ordinance unconstitutionally abridged a homeowner's right to freely express her opinion on the Persian Gulf war through a lawn sign.[32] In general, the courts continue to follow *Metromedia* and its guidance on impermissible content-based distinctions.

[c] Distinction Between Signs and Art

The enforcement of signage regulations against forms of pure art has been challenged successfully in California. One court struck down the application of a local sign ordinance to an historical mural painted on the side of a corner store, finding the application of the ordinance to the noncommercial mural to be overbroad.[33]

PRACTICE TIP: Art or Sign? Any outdoor display may be impacted by local ordinances regulating signs. Murals or holiday decorations may be considered "signs" for purposes of local sign ordinances. Some local sign ordinances include specific design review authority for noncommercial outdoor displays and place specific limits on the percentage of the display which may include words, lettering, or messages. The constitutionality of this type of "art" review regulation may be in question, especially as applied to noncommercial artwork without lettering, as a prior restraint allowing the application of unbridled discretion to purely expressive forms of speech.[34]

[d] Regulating the Advertisement of Tobacco and Alcohol Products

Many jurisdictions are attempting to selectively regulate off-site commercial advertising of tobacco and alcohol products based on proximity to locations frequented by minors, such as schools and playgrounds. State legislation[35] bans outdoor billboard advertising of tobacco products within 1,000 feet of any public or private school or public playground. This prohibition is a minimum state standard and does not preempt local jurisdictions from imposing stricter standards.[36]

Although no California decision or U.S. Supreme Court decision has addressed this type of content-based restriction on billboard advertising, the Fourth Circuit Court of Appeals has upheld a restriction on all publicly visible liquor and cigarette advertising in the City of Baltimore[37] as a valid time, place, and manner restriction advancing the

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[32] *See* City of Ladue v. Gilleo (1994) 512 U.S. 43, 49, 114 S. Ct. 2038, 129 L. Ed. 2d 36.

[33] City of Indio v. Arroyo (1983) 143 Cal. App. 3d 151, 159, 191 Cal. Rptr. 565.

[34] *See* § 60.63[4][g], *below*, for discussion of prior restraints.

[35] Bus. & Prof. Code § 22961 (effective January 1, 1998).

[36] Bus. & Prof. Code § 22961(b).

[37] Anheuser-Busch v. Schmoke (4th Cir. 1996) 101 F.3d 325, 330, *cert. denied*, 520 U.S. 1204, 117 S. Ct. 1569, 137 L. Ed. 2d 714 (1997) (alcohol advertising); Penn Advertising of Baltimore v. Mayor of Baltimore (4th Cir. 1996) 101 F.3d 332, 333, *cert. denied*, 117 S. Ct. 1569 (1997) (cigarette advertising); *but see* 44 Liquormart, Inc. v. Rhode Island (1996) 517 U.S. 484, 516, 116 S. Ct. 1495, 134 L. Ed. 2d 711

legitimate state interest of discouraging underage youth from illegally using tobacco and alcohol products.

[3] Regulation of Newsracks, Handbills, and Outdoor Merchandising

Free speech issues are also raised by regulations which prohibit or limit the distribution or sale of anything on the public streets, including handbills, newspapers, samples, or merchandise. The free speech debate has been extended into areas such as sidewalk merchandising, in which "nonprofit" vendors have raised claims that regulation has deprived them of freedom of expression.

Newsracks are afforded a high level of free speech protection, with the newspaper being one of the purest forms of protected speech. To avoid any potential for abuse or prior restraint of expression, a regulation regarding the placement of newspaper racks must include an enforcement procedure allowing the seizure of the newsracks only following notice and the opportunity for a pre-taking or post-taking hearing.[38] Newsrack regulation may not distinguish between legitimate commercial newspapers and other types of printed literature such as newsletters, handbills, and flyers.[39] On the other hand, local regulations may specify the size, shape, placement, and condition of newsracks in a manner clearly designed to promote public safety and aesthetics.[40]

Generally, newspaper and handbill regulation may not include the necessity to apply for a permit in advance, since such a requirement would allow a government official the unfettered discretion to impose a prior restraint on speech by denying the permit based on the speech's content.[41] A complete ban on the distribution of handbills in specified areas of a public park and a prior permit requirement for distribution in other areas of the park were found to violate the First Amendment when the ban was broader than necessary to prevent disturbances in the park, and the permit requirement contained no clear standards for issuance.[42] However, an ordinance prohibiting private newracks and requiring all publishers to use the city-owned distribution system has been upheld.[43]

Nonprofit groups have been successful in applying the First Amendment to sidewalk vending of message-bearing merchandise, as well as to leafleting. One court invalidated a street merchandising ordinance in San Francisco which gave unbridled discretion to

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(complete state ban on advertising retail liquor prices is unconstitutional restriction on commercial free speech). *But see* Lorillard Tobacco Co. v. Reilly (2001) 533 U.S. 525, 121 S. Ct. 2404 (1,000 ban on smokeless tobacco and cigars did not meet *Hudson* test, though regulation restricting location of products in stores was valid under the First Amendment.)

[38] Kash Enterprises, Inc. v. City of Los Angeles (1977) 19 Cal. 3d 294, 307, 138 Cal. Rptr. 53, 562 P.2d 1302.

[39] City of Cincinnati v. Discovery Network, Inc. (1993) 507 U.S. 410, 424–426, 113 S. Ct. 1505, 123 L. Ed. 2d 99.

[40] Duffy v. City of Arcadia (1987) 195 Cal. App. 3d 308, 311, 243 Cal. Rptr. 87.

[41] City of Lakewood v. Plain Dealer Publishing Co. (1988) 486 U.S. 750, 757, 108 S. Ct. 2138, 100 L. Ed. 2d 771.

[42] Gerritsen v. City of Los Angeles (9th Cir. 1993) 994 F.2d 570, 577–578.

[43] Honolulu Weekly, Inc. v. Harris (9th Cir. 2002) 298 F.3d 1037.

the police chief to deny a vending permit.[44] However, a total ban on the sale of merchandise on Honolulu's city streets has been upheld as applied to a nonprofit group's sale of message-bearing merchandise.[45] In both cases, the court held that message-bearing T-shirt sales fall within the ambit of the First Amendment; however, Honolulu's total ban was upheld as content neutral, narrowly tailored, and allowing ample alternative modes of communication.[46]

[4] Regulation of Adult Entertainment Uses

[a] Scope of Constitutional Limitations

[i] Substantial Governmental Interest Must Be Shown Unrelated to Suppression of Speech

Nonobscene adult entertainment uses are protected under the First Amendment.[47] A local government, however, may subject adult entertainment uses to special regulation so long as the local government (1) shows a substantial government interest in regulating such businesses unrelated to the suppression of speech, and (2) provides a reasonable number of alternative locations for adult entertainment uses.[48] The substantial government interest commonly cited is the preservation of the quality of life in the community. The requirement that an ordinance must be unrelated to the suppression of speech means that the ordinance must be content-neutral[49] and not designed to suppress sexually oriented expression, but rather to combat adverse secondary effects associated with adult entertainment uses.[50] Factual evidence must appear in the record showing that the ordinance is rationally related to the substantial interest purportedly served by the ordinance.[51]

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[44] Gaudiya Vaishnava Society v. City & County of San Francisco (9th Cir. 1990) 952 F.2d 1059, 1065.

[45] One World One Family Now v. City & County of Honolulu (9th Cir. 1996) 76 F.3d 1009, 1016.

[46] One World Family Now v. City and County of Honolulu (9th Cir. 1996) 76 F.3d 1009, 1012–1014.

[47] For purposes of this discussion, the term "adult entertainment uses" will always mean nonobscene adult entertainment land uses or sexually oriented businesses.

[48] City of Renton v. Playtime Theatres, Inc. (1986) 475 U.S. 41, 51–52, 106 S. Ct. 925, 89 L. Ed. 2d 29; Young v. American Mini Theatres, Inc. (1976) 427 U.S. 50, 70, 96 S. Ct. 2440, 49 L. Ed. 2d 310.

[49] The very act of singling out adult entertainment uses for disparate treatment under a zoning code may be a restriction of expression based on its content. However, in upholding special restrictions on adult entertainment uses, the Supreme Court ruled that nonobscene, sexually oriented material warrants less protection than "untrammeled political debate," noting that adult entertainment is much like commercial speech and that the level of protection afforded by the First Amendment varies based on the type of speech and the setting in which it is delivered. Young v. American Mini Theatres, Inc. (1976) 427 U.S. 50, 66–69 ns.23, 24, 96 S. Ct. 2440, 49 L. Ed. 2d 310.

[50] City of Renton v. Playtime Theatres, Inc. (1986) 475 U.S. 41, 54–55, 106 S. Ct. 925, 89 L. Ed. 2d 29.

[51] Ebel v. Corona (9th Cir. 1985) 767 F.2d 635, 638; Sebago, Inc. v. City of Alameda (1989) 211 Cal. App. 3d 1372, 1386–1387, 259 Cal. Rptr. 918.

[ii] Regulation Must Touch on Substantial Amount of Constitutionally Protected Conduct

The constitutional limits on adult entertainment zoning must demonstrate a connection between the First Amendment right to free expression and the conduct. Nudity, for example, is protected speech only if it is combined with some mode of First-Amendment-protected expression, such as dancing.[52] The party asserting that First Amendment protections apply must show that a regulation touches a substantial amount of expressive conduct.[53]

[iii] No Protection for "Obscene" Materials

First Amendment protections do not apply to obscene adult entertainment because obscenity enjoys no constitutional protection.[54] The U.S. Supreme Court has set forth a three-part test to determine whether materials is obscene: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[55]

Controversies regarding adult entertainment zoning tend not to raise issues of obscenity. Most often, the local government concedes that the adult entertainment at issue is not obscene. Rather, controversies arising from regulation of adult entertainment uses tend to focus on the reasonableness of particular time, place, and manner restrictions on adult entertainment uses, i.e., whether the restrictions result in an impermissible total ban on adult entertainment uses or otherwise violate the First Amendment.[56] In addition, controversies over adult entertainment zoning are often

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[52] Schad v. Borough of Mount Ephraim (1981) 452 U.S. 61, 74, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (invalidating total ban on nude dancing); Doran v. Salem Inn, Inc. (1975) 422 U.S. 922, 932, 95 S. Ct. 2561, 45 L. Ed. 2d 648; *compare* Elysium Institute, Inc. v. County of Los Angeles (1991) 232 Cal. App. 3d 408, 426–427, 283 Cal. Rptr. 688 (Constitution does not protect nudity unassociated with another form of expression from government regulation, including zoning), *with* Barnes v. Glen Theatre, Inc. (1991) 501 U.S. 560, 565, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (nude dancing is protected expression, but regulation requiring dancers to wear pasties and g-string upheld).

[53] Clark v. Community for Creative Non-Violence (1984) 468 U.S. 288, 293 n.5, 104 S. Ct. 3065, 82 L. Ed. 2d 221; Las Vegas Nightlife, Inc. v. Clark County (9th Cir. 1994) 38 F.3d 1100, 1102 (upholding regulation specifying permissible conduct of hostesses and operation of adult nightclubs as commercial regulation where nightclub operator admitted in the record that no entertainment was provided by hostesses at clubs).

[54] Miller v. California (1973) 413 U.S. 15, 23, 93 S. Ct. 2607, 37 L. Ed. 2d 419; *see* Hamling v. United States (1974) 418 U.S. 87, 99, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (upholding 18 U.S.C. § 1461, prohibiting use of mails for sending obscene material); United States v. Orito (1973) 413 U.S. 139, 143, 93 S. Ct. 2674, 37 L. Ed. 2d 513 (upholding 18 U.S.C. § 1462, prohibiting transportation of obscene material in interstate commerce).

[55] Miller v. California (1973) 413 U.S. 15, 24–25, 93 S. Ct. 2607, 37 L. Ed. 2d 419.

[56] *See* § 60.63[4][c], *below*.

decided on the basis of common constitutional issues such as vagueness,[57] overbreadth,[58] and prior restraint.[59] In many cases, various combinations of these doctrines are implicated.

PRACTICE TIP: Don't Be Shy When Drafting Ordinances Regulating Adult Entertainment Uses. Both obscenity statutes and local regulations controlling nonobscene adult entertainment uses require high degrees of specificity. To prohibit obscene adult entertainment uses completely, the statute must specifically define the "ultimate sexual acts" that are obscene according to local community standards. Similarly, ordinances controlling nonobscene adult entertainment uses must also specify the types of adult entertainment that are subject to the regulation. Consequently, local government attorneys and staff should be very explicit about the anatomical and behavioral characteristics of the conduct and material being regulated. A city attorney drafting an adult entertainment uses ordinance once quipped to the authors, "If the ordinance itself should come with a parental warning, then I know it'll pass constitutional muster."

[b] Statutory Authorization for Ordinances Controlling Adult Entertainment Uses

In California, statutory provisions specifically authorize local governments to control adult entertainment uses, essentially restating the constitutional scope of permissible regulation of adult entertainment uses.[60] A statute permits local governments to adopt content-neutral ordinances that regulate the time, place, and manner of operating sexually oriented businesses,[61] that is, adult entertainment uses, when the ordinance (1) is designed to serve a substantial government interest, (2) does not unreasonably limit alternative avenues of communication, and (3) is based on narrow, objective, and definite standards.[62] Local governments are specifically authorized to rely on the experiences of other local governments and on the findings of court cases to establish the reasonableness of an adult entertainment uses ordinance.[63] Local governments are also authorized to consider any harmful secondary effects such a business may have on adjacent cities and counties as well as its proximity to churches, schools, residents, and

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[57] *See* § 60.63[4][e], *below*.

[58] *See* § 60.63[4][f], *below*.

[59] *See* § 60.63[4][g], *below*.

[60] *See* § 60.63[4][a], *above*.

[61] *See* § 60.63[4][c], *below*.

[62] Gov. Code § 65850.4(a); *see* Gov. Code § 65850.4(b) (defining "sexually oriented business" as one whose primary purpose is selling or displaying material that, because of its sexually explicit nature, may by state or local law be offered only to persons over 18).

[63] Gov. Code § 65850.4(a).

other businesses located in adjacent cities or counties.[64] The statutory authorization for ordinances controlling adult entertainment uses does not preempt any local government from regulating adult entertainment uses in the manner and to the extent permitted by the United States and California Constitutions.[65]

[c] Time, Place, and Manner Restrictions

[i] The *Renton* Case

Local governments may adopt content-neutral ordinances regulating the time, place, and manner of operation of adult entertainment uses to prevent the adverse secondary effects associated with such businesses,[66] but may not place a total ban on such uses. In the leading case addressing this issue, *City of Renton v. Playtime Theatres, Inc*,[67] the Supreme Court upheld an ordinance that prohibited adult movie theaters from locating within 1,000 feet of any residential zone, single-family or multiple-family dwelling, church, park, or school. The Court applied a "content-neutral" analysis to the ordinance, because it was enacted out of concern for secondary effects rather than to suppress free expression, and because the ordinance was not aimed at the content of the film shown in adult theaters, but at the secondary effects that these establishments imposed on the surrounding neighborhoods.[68] The Court noted that although the regulated establishments presented expressive activity, a deferential time, place, and manner standard of review is appropriate because "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate."[69]

After concluding that the ordinance was content-neutral, the Court in *Renton* examined the nature of the government's interest. First, the Court determined that the City's asserted interest in preventing crime, maintaining property values, and preserving the quality of the city's neighborhoods was important and substantial.[70] The Court also found that the city was entitled to rely on the experiences and studies of other cities

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[64] Gov. Code § 65850.4(e).

[65] Gov. Code § 65850.4(c); *see* Cal. Const. art. I, § 2.

[66] City of Renton v. Playtime Theatres, Inc. (1986) 475 U.S. 41, 51–52, 106 S. Ct. 925, 89 L. Ed. 2d 29.

[67] City of Renton v. Playtime Theatres, Inc. (1986) 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29.

[68] City of Renton v. Playtime Theatres, Inc. (1986) 475 U.S. 41, 50–52, 106 S. Ct. 925, 89 L. Ed. 2d 29; *but see* C.R. of Rialto, Inc. v. City of Rialto (C.D. Cal. 1997) 964 F. Supp. 1401, 1405–1406 (ordinances permitting adult-oriented businesses in general commercial and commercial manufacturing zones, but prohibiting such businesses within 1,000 feet of residential zones or certain specified uses, were unconstitutional because application of the ordinances made it impossible for all adult-oriented entertainment businesses to locate within the city); Young v. City of Simi Valley (C.D. Cal. 1997) 977 F. Supp. 1017, 1020–1021 (ordinance giving "sensitive uses" such as schools and churches de facto veto over location of adult businesses was unconstitutional); *see also* § 60.63[4][c][ii], *below*, for a discussion of *Young v. City of Simi Valley*.

[69] City of Renton v. Playtime Theatres, Inc. (1986) 475 U.S. 41, 49 n.2, 106 S. Ct. 925, 89 L. Ed. 2d 29 (quoting Young v. American Mini Theatres (1976) 427 U.S. 50, 70, 96 S. Ct. 2440, 49 L. Ed. 2d 310).

[70] City of Renton v. Playtime Theatres, Inc. (1986) 475 U.S. 41, 50, 106 S. Ct. 925, 89 L. Ed. 2d 29.

to demonstrate that adult businesses can have harmful effects on the community and that the effects are reduced by dispersing the establishments.[71]

Finally, the Court evaluated whether the city ordinance provided reasonable alternative avenues of communication. Noting that more than five percent of the city's land area was available for potential adult entertainment sites, the Court found that the city had sufficiently provided reasonable alternative avenues of communication.[72] The Court upheld the ordinance, finding it significant that the city did not ban adult theaters altogether but merely regulated their location.[73]

[ii] Location Restrictions

[A] Number of Available Sites

California courts have upheld ordinances similar to the one at issue in *Renton* regulating the proximity of adult entertainment establishments to each other and to residential areas and schools.[74] The California Supreme Court has upheld an ordinance prohibiting adult entertainment businesses from locating within (1) 1,500 feet of another adult business, (2) 1,500 feet of a school or public park, and (3) 1,000 feet of residentially zoned property.[75] The ordinance contained an exception if the business was located in a retail shopping center and its frontage was oriented toward an enclosed mall or the business was isolated from direct view. The Court rejected the argument that the ordinance did not provide "reasonable alternatives for communication" as required by *Renton* because no shopping centers in the city were willing to rent to adult businesses. The Court stated that the reluctance or refusal of private landowners to rent to adult businesses was not dispositive as to whether the ordinance provided a reasonable opportunity for such businesses to locate within the city. The Court declined

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[71] City of Renton v. Playtime Theatres, Inc. (1986) 475 U.S. 41, 51, 106 S. Ct. 925, 89 L. Ed. 2d 29.

[72] City of Renton v. Playtime Theatres, Inc. (1986) 475 U.S. 41, 53 n.8, 106 S. Ct. 925, 89 L. Ed. 2d 29.

[73] City of Renton v. Playtime Theatres, Inc. (1986) 475 U.S. 41, 46, 106 S. Ct. 925, 89 L. Ed. 2d 29.

[74] City of Vallejo v. Adult Books (1985) 167 Cal. App. 3d 1169, 1180, 213 Cal. Rptr. 143, *cert. denied*, 475 U.S. 1064 (1986) (no adult bookstore or theater within 500 feet of residential zone, park, playground, library, or school; within 1,000 feet of another such business; or in any but three zoning districts); Walnut Properties, Inc. v. City Council (1980) 100 Cal. App. 3d 1018, 1022–1023, 161 Cal. Rptr. 411, *cert. denied*, 449 U.S. 836, 101 S. Ct. 109, 66 L. Ed. 2d 42 (no adult entertainment business within 500 feet of residential area or within 1,000 feet of other adult entertainment businesses, public schools, or other specified establishments likely to be used by minors); *see* People v. Library One, Inc. (1991) 229 Cal. App. 3d 973, 980–990, 280 Cal. Rptr. 400 (upholding provisions requiring that no adult business could be located within 500-foot radius of a place used exclusively for religious worship, school, park, playground, or similar use; location had to be buffered from residential zoned areas; and external appearance must be consistent with other commercial structures); *see also* Isbell v. City of San Diego (9th Cir. 2001) 258 F.3d 1108, 1115 (so long as city provides reasonable alternative avenues of communication, it may require adult businesses without exception to be located more than 1,000 feet from a residential area; thus, regulation applied where freeway ran between plaintiff's business and a residential neighborhood 900 feet away).

[75] City of National City v. Wiener (1992) 3 Cal. 4th 832, 836, 12 Cal. Rptr. 2d 701, 838 P.2d 223.

to hold local governments responsible for the business decisions of private individuals acting for their own economic concerns.[76]

An ordinance that fails to provide reasonable alternative locations for adult entertainment uses will in most cases be invalidated as a complete ban on expression[77] or an unreasonable restriction.[78]

In determining whether an adult business has been provided with reasonable alternate locations, economic suitability is an appropriate consideration when evaluating whether relocation sites are part of an actual "market" for commercial enterprises.[79] A relocation site will be considered part of the relevant market if the following requirements are met:[80]

- It is reasonable to believe the property will at some point become available to any commercial enterprise;[81]
- In manufacturing or industrial areas, there is public access and proper infrastructure; and
- The site suits some generic commercial enterprise.

Relocation sites that are commercially zoned are part of the relevant market.[82] Applying these factors, the Ninth Circuit affirmed an injunction against enforcing a location-restrictive ordinance on the ground it did not provide adult businesses reasonable opportunities to relocate.[83] In another case, an adult ordinance that allowed seven potential sites for adult businesses, three of which could be operated simultaneously ("simultaneous sites"), provided a reasonable opportunity to open and operate an adult bookstore when there were no existing adult businesses and plaintiff was the only person seeking a permit.[84]

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[76] City of National City v. Wiener (1992) 3 Cal. 4th 832, 847–848, 12 Cal. Rptr. 2d 701, 838 P.2d 223.

[77] Schad v. Burough of Mount Ephraim (1981) 452 U.S. 61, 74–77, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (invalidating total ban on all entertainment, including adult entertainment, within boundaries of suburb); Walnut Properties, Inc. v. City of Whittier (1988) 861 F.2d 1102, 1110 (invalidating ordinance requiring geographical separations of adult businesses effectively denying reasonable opportunity to operate adult theater within city limits).

[78] *See, e.g.,* City of Stanton v. Cox (1989) 207 Cal. App. 3d 1557, 1566, 255 Cal. Rptr. 682 (invalidating ordinance prohibiting adult theater within 1,000 feet of another adult theater in city so geographically small that "the paucity of alternative sites was so glaring as to make a mockery of constitutional protections").

[79] Topanga Press, Inc. v. City of Los Angeles (9th Cir. 1993) 989 F.2d 1524, 1530.

[80] Topanga Press, Inc. v. City of Los Angeles (9th Cir. 1993) 989 F.2d 1524, 1531.

[81] *See* Lim v. City of Long Beach (9th Cir. 2000) 217 F.3d 1050, 1055 (because sites must only reasonably become available to some generic commercial enterprise, sites with restrictive leases banning adult entertainment establishments are part of the market).

[82] Topanga Press, Inc. v. City of Los Angeles (9th Cir. 1993) 989 F.2d 1524, 1531.

[83] Topanga Press, Inc. v. City of Los Angeles (9th Cir. 1993) 989 F.2d 1524, 1533–1534.

[84] Diamond v. City of Taft (9th Cir. 2000) 215 F.3d 1052, 1058.

A party seeking to open and operate an adult business must be given the opportunity to show that potentially available sites identified by the local government would not reasonably become available because, for example, they were encumbered by long-term leases.[85]

In *Young v. City of Simi Valley*,[86] the Ninth Circuit held that the district court erred in holding that "as a matter of general law," four possible simultaneous sites did not amount to a reasonable number of alternative means of communication to satisfy the test in *Renton*.[87] The Ninth Circuit held this holding was erroneous because the district court had not performed a fact-specific inquiry to determine whether the number of potential sites was reasonable given the particular characteristics of the city, including its size and make-up, as required by *Renton*.

The court declined to adopt a bright line rule that an ordinance is constitutional when the number of locations available for such businesses equals or exceeds the number of existing adult businesses. The court stated that this "supply and demand" analysis is insufficient to account for the chilling effect that an adult use zoning ordinance may have on prospective business owners, and therefore is only one of several factors that a court should consider when determining whether an adult business has a reasonable opportunity to open and operate. Those factors include all of the following:[88]

- The percentage of acreage theoretically available;
- The number of sites potentially available in relation to the population;
- Community needs;
- The incidence of adult businesses in other comparable communities; and
- The goals of the city plan.

[B] Effect of Permitting Schemes

In *Young v. City of Simi Valley*,[89] the Ninth Circuit invalidated an adult business zoning ordinance that allowed sensitive uses such as churches and schools to apply for an over-the-counter zoning clearance to locate prohibitively close to an adult business and thereby disqualify a pending adult use permit. The court found that the provision gave rise to a "sensitive use veto" that denied potential adult business owners a reasonable opportunity to open and operate the business.[90] The court stated that, in

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[85] Lim v. City of Long Beach (9th Cir. 2000) 217 F.3d 1050, 1056.

[86] Young v. City of Simi Valley (9th Cir. 2000) 216 F.3d 807.

[87] Young v. City of Simi Valley (C.D. Cal. 1997) 977 F. Supp. 1017, 1021, *rev'd*, Young v. City of Simi Valley (9th Cir. 2000) 216 F.3d 807.

[88] Young v. City of Simi Valley (9th Cir. 2000) 216 F.3d 807, 822–823; *see* Isbell v. City of San Diego (9th Cir. 2001) 258 F.3d 1108, 1113–1114 (city's list of available sites was fatally flawed because it ignored city's 1,000-foot separation requirement; court could not conclude that number of sites with existing adult businesses provided reasonable alternative means of communication without considering factors set forth in *Young*).

[89] Young v. City of Simi Valley (9th Cir. 2000) 216 F.3d 807.

[90] Young v. City of Simi Valley (9th Cir. 2000) 216 F.3d 807, 817–818.

defining the contours of the "reasonable alternative avenues of communication" test under *Renton*, all previous cases have focused on the geographical area or the number of sites available for adult uses, and not on the procedure by which a permit is granted or denied. However, the court observed that *Renton* did not expressly limit its "reasonableness" inquiry to the number of available sites within a city. The court concluded that the procedure by which a city dispenses its permits may deprive potential businesses of reasonable alternative avenues of communication in the same way as would a paucity of available sites.[91]

[iii] Operations Restrictions

Ordinances that place conditions on how adult businesses operate are also evaluated on the basis of whether they impose reasonable time, place, and manner standards. For example, an ordinance prohibiting the operation of peep shows with concealed or closed booths was upheld as a reasonable time, place, or manner regulation. The court found that the city had a substantial interest in preventing activity likely to occur in closed booths, and that the ordinance restricted the manner of the activity rather than the dissemination of ideas.[92]

In another case, city ordinances requiring all adult arcade booths to be open to an adjacent public room so that the area inside was visible by direct line of sight to persons in the adjacent public room, and requiring at least one employee on duty in that public room whenever a patron was present, were held to be valid manner restrictions.[93] The court held that any adverse economic impact of the ordinances was irrelevant. Even if the costs of compliance were so great that the plaintiff would be forced out of business, the ordinances did not pose any intrinsic limitation on the operation of the arcades, but merely increased plaintiff's vulnerability to market forces.[94]

By contrast, the California Supreme Court found unconstitutional an ordinance forbidding picture arcades to operate between 2:00 A.M. and 9:00 A.M. The court found that the city's objective of preventing activities occurring in the booths could be achieved by more narrow means, such as requiring open booths or patrolling the arcade.[95] However, in a later case the California Supreme Court responded to a certified question from the Ninth Circuit, stating that hours-of-operation restrictions are reviewed under intermediate scrutiny as applied by the United States Supreme Court.[96]

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[91] Young v. City of Simi Valley (9th Cir. 2000) 216 F.3d 807, 817–818.

[92] Deluxe Theatre & Bookstore, Inc. v. City of San Diego (1985) 175 Cal. App. 3d 980, 984–985, 221 Cal. Rptr. 100.

[93] Spokane Arcade, Inc. v. City of Spokane (9th Cir. 1996) 75 F.3d 663, 667.

[94] Spokane Arcade, Inc. v. City of Spokane (9th Cir. 1996) 75 F.3d 663, 665–666; *see* Fantasyland Video, Inc. v. County of San Diego (9th Cir. 2007) 505 F.3d 996, 1002, 1005 (rejecting constitutional challenge to open booth ordinance imposing requirements similar to those in *Spokane Arcade*).

[95] People v. Glaze (1980) 27 Cal. 3d 841, 848, 166 Cal. Rptr. 859, 614 P.2d 291.

[96] Fantasyland Video, Inc. v. County of San Diego (2007) 2007 Cal. LEXIS 10551 (order denying request to decide question of California law).

This is the standard identified in *Renton*.[97] The Ninth Circuit concluded that the response to the certified question, including citations to California decisions, suggested that the standard under the California Constitution is the same in this situation as that applied by the United States Supreme Court in *Renton*.[98] It held that under *Renton*, the adult business failed to supply sufficient evidence to "cast direct doubt" on the county's asserted secondary-effects rationale. The court held that the challenge failed under the California Constitution for the same reason.[99]

In *City of Los Angeles v. Alameda Books, Inc.*,[100] the United States Supreme Court reversed a summary judgment for the plaintiffs in an action challenging a city ordinance prohibiting more than one adult business in the same building or structure. In a plurality decision, with Justice Kennedy concurring in the judgment, the Court held that the city could rely on a 1977 study showing that areas with high concentrations of adult establishments were associated with high crime rates, even though the study addressed separate establishments, not combined operations in a single structure. The Court stated that it was rational for the city to infer that reducing the concentration of adult operations in a neighborhood, whether within separate establishments or in one large establishment, would reduce crime rates.[101] In his concurrence, Justice Kennedy stated that the city would also have to show that the quantity of speech would be undiminished and that the total secondary effects would be significantly reduced.[102]

An Indiana statute prohibiting all public nudity and requiring "nude" dancers to wear pasties and g-strings was upheld by the Supreme Court as a reasonable restriction on the *manner* of nude dancing.[103] After determining that the ordinance did not completely

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[97] City of Renton v. Playtime Theatres, Inc. (1986) 475 U.S. 41, 50–52, 106 S. Ct. 925, 89 L. Ed. 2d 29 (local governments may adopt content-neutral ordinances regulating time, place, and manner of operation of adult entertainment uses to prevent adverse secondary effects associated with such businesses); for discussion of *Renton*, see § 60.63[4][c][i].

[98] Fantasyland Video, Inc. v. County of San Diego (9th Cir. 2007) 505 F.3d 996, 1001, *citing* Los Angeles Alliance for Survival v. City of Los Angeles (2000) 22 Cal. 4th 352, 357, 364, 93 Cal. Rptr. 2d 1, 993 P.2d 334; City of National City v. Wiener (1992) 3 Cal. 4th 832, 841–843, 12 Cal. Rptr. 2d 701, 838 P.2d 223; People v. Superior Court (1989) 49 Cal. 3d 14, 26, 259 Cal. Rptr. 740, 774 P.2d 769.

[99] Fantasyland Video, Inc. v. County of San Diego (9th Cir. 2007) 505 F.3d 996, 1002.

[100] City of Los Angeles v. Alameda Books, Inc. (2002) 535 U.S. 425, 122 S. Ct. 1728, 152 L. Ed. 2d 670.

[101] City of Los Angeles v. Alameda Books, Inc. (2002) 535 U.S. 425, 436, 122 S. Ct. 1728, 152 L. Ed. 2d 670.

[102] City of Los Angeles v. Alameda Books, Inc. (2002) 535 U.S. 425, 451–453, 122 S. Ct. 1728, 152 L. Ed. 2d 670; *but see* Center for Fair Public Policy v. Maricopa County (9th Cir. 2003) 336 F.3d 1153, 1163 (Justice Kennedy's proportionality language was designed for "a classic erogenous zoning ordinance whereby the city was restricting certain land uses" and was never intended to apply to hours-of-operation ordinance; proportionality analysis, if applied to a time restriction, would invalidate all such laws); Fantasyland Video, Inc. v. County of San Diego (9th Cir. 2007) 505 F.3d 996, 1005 (Justice Kennedy's concurrence inapplicable to open-booth requirements; overall quantity of protected expression must be reduced, but only because patron is chilled from also contemporaneously engaging in unprotected behavior).

[103] Barnes v. Glen Theatre, Inc. (1991) 501 U.S. 560, 566–567, 111 S. Ct. 2456, 115 L. Ed. 2d 504

suppress expressive conduct, the Court ruled that the requirement that dancers wear pasties and g-strings was narrowly tailored to achieve the state's purpose while infringing on as little expression as possible.[104]

In a later decision, *City of Erie v. Pap's A.M.*,[105] the Supreme Court upheld an ordinance banning all forms of public nudity. The Court concluded that government restrictions on public nudity such as those included in the City of Erie ordinance at issue, which regulated conduct alone, should be evaluated under the less-stringent standard applied to content-neutral restrictions on symbolic speech.[106] The plurality found that the ordinance was a content-neutral regulation that was valid under the landmark *O'Brien*[107] case (which held that a sufficiently important governmental interest can justify incidental limitations on First Amendment freedoms), because the City of Erie ordinance was aimed at combating crime and other negative secondary effects caused by the presence of adult entertainment establishments.[108] The plurality decision further stated that even if the public nudity ban had some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch is dropped, the dancers at adult entertainment establishments were free to perform wearing pasties and g-strings. Thus, any effect on overall expression was de minimis.[109]

[d] Nuisance Abatement Ordinances

A nuisance abatement ordinance may be enforced against illegal activities at an adult bookstore.[110] In *E.W.A.P., Inc. v. City of Los Angeles*,[111] the police department requested revocation of the plaintiff's conditional use permit because voluntary agreements plaintiff had entered into with the zoning department were ineffective in curbing lewd conduct, public urination, solicitation, and harassment of residents. The assistant zoning administrator found that the property was a public nuisance and that its operation had adversely affected nearby commercial and residential uses, had acted as a magnet for illegal activities requiring excessive police service, and had resulted in harassment of passers-by, prostitution, public urination, loitering, cruising, littering, traffic violations, lewd conduct, and police detention and arrests. The zoning board imposed operating conditions, including reduced hours.

The court of appeal held that the trial court properly found that application of the nuisance abatement ordinance to the operation of the adult bookstore was not a

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(distinguishing Schad v. Borough of Mount Ephraim (1981) 452 U.S. 61, 74, 101 S. Ct. 2176, 68 L. Ed. 2d 671, which invalidated total ban on nude dancing).

[104] Barnes v. Glen Theatre, Inc. (1991) 501 U.S. 560, 572, 111 S. Ct. 2456, 115 L. Ed. 2d 504.

[105] City of Erie v. Pap's A.M. (2000) 529 U.S. 277, 280–282, 120 S. Ct. 1382, 146 L. Ed. 2d 265.

[106] City of Erie v. Pap's A.M. (2000) 529 U.S. 277, 281–282, 120 S. Ct. 1382, 146 L. Ed. 2d 265.

[107] United States v. O'Brien (1968) 391 U.S. 367, 377, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (law banning burning of draft card did not violate First Amendment).

[108] City of Erie v. Pap's A.M. (2000) 529 U.S. 277, 280–282, 120 S. Ct. 1382, 146 L. Ed. 2d 265.

[109] City of Erie v. Pap's A.M. (2000) 529 U.S. 277, 281, 120 S. Ct. 1382, 146 L. Ed. 2d 265.

[110] E.W.A.P., Inc. v. City of Los Angeles (1997) 56 Cal. App. 4th 310, 317, 65 Cal. Rptr. 2d 325.

[111] E.W.A.P., Inc. v. City of Los Angeles (1997) 56 Cal. App. 4th 310, 65 Cal. Rptr. 2d 325.

violation of the First Amendment, because the application of the ordinance had a direct impact on nuisance activities and only an indirect impact on the plaintiff's First Amendment rights.[112] Furthermore, the court held that the ordinance was not vague, uncertain, or overbroad and did not grant the zoning administrator unfettered discretion, because the nuisance activities were specifically defined in the ordinance, and it was clear that the precise conduct proscribed by the ordinance had occurred.[113]

[e] Vagueness

In ordinances regulating adult entertainment uses "[p]recision of the regulation must be the touchstone" of constitutionality.[114] The danger of censorship and arbitrary suppression inherent in the employment of imprecise standards is so great that courts will void vague regulations even in the absence of actual discrimination.[115]

Vagueness challenges often arise when a local government requires a license or conditional use permit to operate an adult entertainment use. Definite and objective standards must be employed in the issuance of both licenses and conditional use permits for adult entertainment uses.[116] Thus, conditional use permit ordinances for adult entertainment uses (and other First-Amendment-protected activities) must contain sufficiently narrow, definite, and objective standards that *guarantee* a permit will issue to an applicant who has satisfied all the standards.[117]

However, not all ambiguity in a local ordinance will render an ordinance unconstitutionally vague. An ordinance will not be void for uncertainty if any reasonable and practical construction of the language allows the court to interpret the ordinance in a

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[112] E.W.A.P., Inc. v. City of Los Angeles (1997) 56 Cal. App. 4th 310, 317, 65 Cal. Rptr. 2d 325; *see* Arcara v. Cloud Books, Inc. (1986) 478 U.S. 697, 707, 106 S. Ct. 3172, 92 L. Ed. 2d 568 (U.S. Const. amend. I, is not implicated by the enforcement of a public health regulation of general application against the physical premises in which books are sold).

[113] E.W.A.P., Inc. v. City of Los Angeles (1997) 56 Cal. App. 4th 310, 321, 65 Cal. Rptr. 2d 325.

[114] City of Imperial Beach v. Escott (1981) 115 Cal. App. 3d 134, 138, 171 Cal. Rptr. 197. Many ordinances challenged as unconstitutionally vague will also be vulnerable to a challenge for overbreadth because an ordinance that does not clearly identify the regulated uses will likely also impinge on uses unrelated to the purpose of the ordinance. *See* § 60.63[4][f], *below*, for discussion of overbreadth. Similarly, conditional use permit or licensing ordinances challenged as unconstitutionally vague may also be challenged as prior restraints, raising the level of scrutiny to a strong presumption against the validity of the ordinance. *See* § 60.63[4][g], *below*, for discussion of prior restraints.

[115] Burton v. Municipal Court (1968) 68 Cal. 2d 684, 688, 694–695, 68 Cal. Rptr. 721, 441 P.2d 281; City of Imperial Beach v. Palm Avenue Books, Inc. (1981) 115 Cal. App. 3d 134, 138, 140, 171 Cal. Rptr. 197.

[116] Ebel v. City of Garden Grove (1981) 120 Cal. App. 3d 399, 409, 176 Cal. Rptr. 312 (citing Perrine v. Municipal Court (1971) 5 Cal. 3d 656, 662, 97 Cal. Rptr. 320, 488 P.2d 648); City of Imperial Beach v. Palm Avenue Books, Inc. (1981) 115 Cal. App. 3d 134, 138, 171 Cal. Rptr. 197.

[117] Ebel v. City of Garden Grove (1981) 120 Cal. App. 3d 399, 409, 176 Cal. Rptr. 312 (citing Perrine v. Municipal Court (1971) 5 Cal. 3d 656, 662, 97 Cal. Rptr. 320, 488 P.2d 648); *see* Smith v. County of Los Angeles (1994) 24 Cal. App. 4th 990, 1003, 29 Cal. Rptr. 2d 680; Dease v. City of Anaheim (C.D. Cal. 1993) 826 F. Supp. 336, 341.

way that passes constitutional scrutiny.[118] In *City of Vallejo v. Adult Books*,[119] the court upheld an ordinance defining an adult theater as a theater where 25 percent or more of the films shown included material "describing or depicting certain specific acts or other sexual excitement or sexual conduct."[120] Although the court found that there was ambiguity in the ordinance because it failed to differentiate films containing only isolated depictions of sexual conduct from those distinguished or characterized by such conduct, the court interpreted the ordinance to apply only to those films emphasizing sexual excitement or sexual conduct.[121] As construed, the court ruled that the ordinance did not threaten First Amendment rights as applied to an enterprise clearly within the regulatory scope of the ordinance.[122]

In both *Kuhns v. Board of Supervisors*[123] and *Pringle v. Covina*,[124] the courts found that the phrase "distinguished or characterized by an emphasis on matter depicting" certain sexual acts and anatomical areas was not unconstitutionally vague. The courts interpreted the phrase to mean films whose dominant or predominant character and theme was the depiction of the enumerated sexual activities or anatomical areas.[125]

In addition, uncertainty on the face of an ordinance does not necessarily render the ordinance unconstitutionally vague if no uncertainty exists in applying the ordinance to

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[118] *See, e.g.,* People v. Superior Court (1989) 49 Cal. 3d 14, 27–28, 259 Cal. Rptr. 740, 774 P.2d 769; City of Vallejo v. Adult Books (1985) 167 Cal. App. 3d 1169, 1178, 213 Cal. Rptr. 143, *cert. denied*, 475 U.S. 1064; Kuhns v. Board of Supervisors (1982) 128 Cal. App. 3d 369, 376, 181 Cal. Rptr. 1, *disapproved on other grounds*, People v. Superior Court (1989) 49 Cal. 3d 14, 27–28, 259 Cal. Rptr. 740, 774 P.2d 769; Pringle v. Covina (1981) 115 Cal. App. 3d 151, 161, 171 Cal. Rptr. 251, *disapproved on other grounds*, People v. Superior Court (1989) 49 Cal. 3d 14, 27–28, 259 Cal. Rptr. 740, 774 P.2d 769. *People v. Superior Court* overruled the require-ment—relied on in *Pringle* and *Kuhns*—that over 50 percent of an alleged adult entertainment use must be dedicated to adult entertainment material before an adult entertainment ordinance could apply to the use. People v. Superior Court (1989) 49 Cal. 3d 14, 18–19, 259 Cal. Rptr. 740, 774 P.2d 769.

[119] City of Vallejo v. Adult Books (1985) 167 Cal. App. 3d 1169, 213 Cal. Rptr. 143, *cert. denied*, 475 U.S. 1064.

[120] City of Vallejo v. Adult Books (1985) 167 Cal. App. 3d 1169, 1174–1176, 213 Cal. Rptr. 143, *cert. denied*, 475 U.S. 1064.

[121] City of Vallejo v. Adult Books (1985) 167 Cal. App. 3d 1169, 1176, 213 Cal. Rptr. 143, *cert. denied*, 475 U.S. 1064.

[122] City of Vallejo v. Adult Books (1985) 167 Cal. App. 3d 1169, 1175–1176, 213 Cal. Rptr. 143, *cert. denied*, 475 U.S. 1064.

[123] Kuhns v. Board of Supervisors (1982) 128 Cal. App. 3d 369, 181 Cal. Rptr. 1, *disapproved on other grounds*, People v. Superior Court (1989) 49 Cal. 3d 14, 259 Cal. Rptr. 740, 774 P.2d 769.

[124] Pringle v. Covina (1981) 115 Cal. App. 3d 151, 171 Cal. Rptr. 251, *disapproved on other grounds*, People v. Superior Court (1989) 49 Cal. 3d 14, 259 Cal. Rptr. 740, 774 P.2d 769.

[125] Kuhns v. Board of Supervisors (1982) 128 Cal. App. 3d 369, 375, 181 Cal. Rptr. 1, *disapproved on other grounds*, People v. Superior Court (1989) 49 Cal. 3d 14, 23–24, 259 Cal. Rptr. 740, 774 P.2d 769; Pringle v. Covina (1981) 115 Cal. App. 3d 151, 159–160, 171 Cal. Rptr. 251, *disapproved on other grounds*, People v. Superior Court (1989) 49 Cal. 3d 14, 23–24, 259 Cal. Rptr. 740, 774 P.2d 769.

the specific use or specific activity at issue.[126] In *Young v. American Mini Theatres, Inc.*,[127] the Supreme Court held that the phrase "characterized by an emphasis" on specific sexual activities and specified anatomical areas was not unconstitutionally vague as applied to the theaters at issue in the case, which offered adult films on a regular basis.

[f] Overbreadth

Ordinances regulating adult entertainment uses may not be so overly broad that they subject uses to regulation that are not related to the purpose of regulating adult entertainment uses.[128] The U.S. Supreme Court invalidated an ordinance which prohibited all drive-in movie theaters from showing any films containing nudity if the screen was visible to the public beyond the boundaries of the drive-in theater's lot.[129] The purpose of the statute was to protect children from sexually explicit material; however, the court found that a ban on all films containing nudity reached far more films than necessary to protect children off-site from viewing sexually explicit films.[130] Similarly, a local prohibition on all live entertainment, including adult entertainment, within a suburb cut too wide a swath through protected speech.[131]

A federal court invalidated the application of an adult entertainment zoning ordinance to motels offering a full array of television channels, including adult entertainment channels.[132] The ordinance restricted adult uses, including adult motels, to specified geographical areas and zones in order to prevent certain harmful secondary effects arising from such adult uses. The definition of an "adult motel" included any establishment that provided patrons with closed circuit television transmissions, films, motion pictures, video cassettes, slides, or other photographic reproductions of specified sexual activities or anatomical areas. The motel owners that challenged the ordinance conceded that the channels available to patrons included adult material as defined in the ordinance. However, the owners argued successfully that failing to distinguish between common motels with a full array of television programming from those motels specializing in adult entertainment reached more uses than necessary to prevent adverse secondary effects.[133]

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[126] *See, e.g.,* Young v. American Mini Theatres, Inc. (1976) 427 U.S. 50, 61, 96 S. Ct. 2440, 49 L. Ed. 2d 310.

[127] Young v. American Mini Theatres, Inc. (1976) 427 U.S. 50, 58–59, 96 S. Ct. 2440, 49 L. Ed. 2d 310.

[128] Schad v. Burough of Mount Ephraim (1981) 452 U.S. 61, 74, 101 S. Ct. 2176, 68 L. Ed. 2d 671; Erznoznik v. City of Jacksonville (1975) 422 U.S. 205, 213, 95 S. Ct. 2268, 45 L. Ed. 2d 125; Tollis, Inc. v. San Bernardino County (9th Cir. 1987) 827 F.2d 1329, 1333.

[129] Erznoznik v. City of Jacksonville (1975) 422 U.S. 205, 213, 95 S. Ct. 2268, 45 L. Ed. 2d 125.

[130] Erznoznik v. City of Jacksonville (1975) 422 U.S. 205, 212, 95 S. Ct. 2268, 45 L. Ed. 2d 125.

[131] Schad v. Burough of Mount Ephraim (1981) 452 U.S. 61, 74, 101 S. Ct. 2176, 68 L. Ed. 2d 671.

[132] Patel & Patel v. South San Francisco (N.D. Cal. 1985) 606 F. Supp. 666, 672.

[133] Patel & Patel v. South San Francisco (N.D. Cal. 1985) 606 F. Supp. 666, 672.

[g] Prior Restraints

Although prior restraints on adult entertainment uses are not unconstitutional per se, they bear a heavy presumption against their constitutional validity.[134] Prior restraint issues generally arise when an adult entertainment use must apply for a license or permit to operate. Cases addressing prior restraints on First-Amendment-protected activities have identified the following two primary features that will not be tolerated:

- A scheme that places unbridled discretion in the hands of a government official or agency;[135] and
- A scheme that fails to place limits on the time within which the decisionmaker must issue the license or permit.[136]

A licensing scheme that fails to set a time period within which the licensing authority must act is a species of unbridled discretion and creates an impermissible risk of suppressing ideas.[137]

The U.S. Supreme Court invalidated a licensing scheme in a comprehensive adult entertainment zoning ordinance as a prior restraint because the ordinance failed to provide adequate procedural safeguards.[138] The licensing scheme at issue required the chief of police to issue a license for certain adult entertainment uses within 30 days of receiving the application, but conditioned the license on approval by other municipal agencies without setting forth time limits on such approvals.[139] The Court found that at least the following two procedural safeguards are necessary to ensure that licenses for adult entertainment uses are issued in a reasonable period of time to protect adult entertainment uses from unbridled censorship:[140]

- Any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; and
- Expeditious judicial review of that decision must be available.

Similar to licensing schemes, local government ordinances requiring conditional use permits for adult entertainment uses must also specify time limits for granting or

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[134] FW/PBS, Inc. v. City of Dallas (1990) 493 U.S. 215, 225, 110 S. Ct. 596, 107 L. Ed. 2d 603; City of Vallejo v. Adult Books (1985) 167 Cal. App. 3d 1169, 1177, 213 Cal. Rptr. 143.

[135] FW/PBS, Inc. v. City of Dallas (1990) 493 U.S. 215, 225–226, 110 S. Ct. 596, 107 L. Ed. 2d 603 (citing several cases to support the proposition).

[136] FW/PBS, Inc. v. City of Dallas (1990) 493 U.S. 215, 226, 110 S. Ct. 596, 107 L. Ed. 2d 603 (citing Freedman v. Maryland (1965) 380 U.S. 51, 58, 85 S. Ct. 734, 13 L. Ed. 2d 649, and Vance v. Universal Amusement Co. (1980) 445 U.S. 308, 316, 100 S. Ct. 1156, 63 L. Ed. 2d 413).

[137] Freedman v. Maryland (1965) 380 U.S. 51, 58–60, 85 S. Ct. 734, 13 L. Ed. 2d 649; *see* Baby Tam & Co., Inc. v. City of Las Vegas (9th Cir. 2000) 199 F.3d 1111, 1115 (adult business ordinance was facially unconstitutional because it did not set time limits within which a license had to be issued).

[138] FW/PBS, Inc. v. City of Dallas (1990) 493 U.S. 215, 223, 110 S. Ct. 596, 107 L. Ed. 2d 603 (citing Freedman v. Maryland (1965) 380 U.S. 51, 58–60, 85 S. Ct. 734, 13 L. Ed. 2d 649).

[139] FW/PBS, Inc. v. City of Dallas (1990) 493 U.S. 215, 217–218, 225, 110 S. Ct. 596, 107 L. Ed. 2d 603.

[140] FW/PBS, Inc. v. City of Dallas (1990) 493 U.S. 215, 228–229, 110 S. Ct. 596, 107 L. Ed. 2d 603.

denying the permit and must not vest unbridled discretion in the agency or the decisionmaker.[141] A federal district court invalidated a conditional use permit ordinance applied to a restaurant intending to offer live semi-nude dancing.[142] The ordinance gave the zoning administrator unbridled discretion in scheduling the date of the public hearing and excessive substantive discretion in denying the permit application.[143] The ordinance also failed to provide sufficient time limits within which the local police must conclude its background investigation into the applicant and the property.[144]

Prior-restraint issues often arise when local permitting ordinances are unconstitutionally vague.[145] Although conditional use permits for activities that are not protected by the First Amendment are *discretionary* approvals, conditional use permit ordinances for adult entertainment uses and other First-Amendment-protected activities must contain sufficiently narrow, definite, and objective standards such that an applicant is *guaranteed* that a permit will issue upon satisfying all the standards.[146]

In two cases, courts invalidated ordinances allowing the local government to deny a conditional use permit for live nude dancing and entertainment if the adult entertainment use would "adversely affect the use" of churches or schools, or if the adult entertainment use was "insufficiently buffered in relation to residential zones."[147] Each court invalidated the ordinances as prior restraints, ruling that such standards vested too much discretion in the decisionmakers because they lacked the requisite narrow, objective, and definite criteria to pass constitutional scrutiny. Although these cases could have been decided on the basis of vagueness alone,[148] both courts approached the ordinances as prior restraints, thus raising the level of scrutiny to a presumption against the validity of the ordinances.

[h] Expedited Review

[i] Prompt Decision Requirement

In *Baby Tam & Co., Inc. v. City of Las Vegas*,[149] the Ninth Circuit issued a permanent injunction against an adult bookstore licensing and zoning ordinance on the ground it

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[141] Thomas v. County of Los Angeles (1991) 232 Cal. App. 3d 916, 925, 283 Cal. Rptr. 815; People v. Library One, Inc. (1991) 229 Cal. App. 3d 973, 987, 280 Cal. Rptr. 400.

[142] 3570 E. Foothill Blvd, Inc. v. City of Pasadena (C.D. Cal. 1996) 912 F. Supp. 1268, 1278.

[143] 3570 E. Foothill Blvd, Inc. v. City of Pasadena (C.D. Cal. 1996) 912 F. Supp. 1268, 1274–1276.

[144] 3570 E. Foothill Blvd, Inc. v. City of Pasadena (1996 C.D. Cal.) 912 F. Supp. 1268, 1276.

[145] *See* § 60.63[4][e], *above*, for a discussion of vagueness.

[146] Ebel v. City of Garden Grove (1981) 120 Cal. App. 3d 399, 409, 176 Cal. Rptr. 312 (citing Perrine v. Municipal Court (1971) 5 Cal. 3d 656, 662, 97 Cal. Rptr. 320, 488 P.2d 648); *see* Smith v. County of Los Angeles (1994) 24 Cal. App. 4th 990, 1003, 29 Cal. Rptr. 2d 680; Dease v. City of Anaheim (C.D. Cal. 1993) 826 F. Supp. 336, 341.

[147] Smith v. County of Los Angeles (1994) 24 Cal. App. 4th 990, 1002, 29 Cal. Rptr. 2d 680; Dease v. City of Anaheim (C.D. Cal. 1993) 826 F. Supp. 336, 341.

[148] *See* § 60.63[4][e], *above*.

[149] Baby Tam & Co., Inc. v. City of Las Vegas (1998) 154 F.3d 1097, 1101, *overruled in part by* City of Littleton v. Z. J. Gifts D-4, L.L.C. (2004) 541 U.S. 774, 124 S. Ct. 2219, 159 L. Ed. 2d 84.

was an unconstitutional prior restraint of speech because it lacked a provision for prompt judicial review.[150] The court concluded that in the context of adult business licensing schemes, mere access to judicial review is insufficient to satisfy the "prompt judicial review" procedural safeguard. It held that "prompt judicial review" requires an opportunity for a prompt hearing and a prompt decision by a judicial officer.[151]

In *City of Littleton v. Z. J. Gifts D-4, L.L.C.,*[152] the Supreme Court resolved a split among the circuits on this issue, holding that the First Amendment requires that an adult business ordinance provide not only for prompt judicial review of the denial of a license but also for a prompt judicial decision. However, the Court held that strict time limits do not apply, and the requirement of a prompt judicial decision was met in that case where the ordinance provided that an administrative decision could be appealed to the state courts.[153]

[ii] California's Response: The Expedited Review Procedure

Following the Ninth Circuit's 1998 decision in *Baby Tam & Co.,* the California Legislature in 1999 enacted provisions for the expedited review of the issuance, revocation, suspension, or denial of a permit or other entitlement for expressive conduct protected by the First Amendment.[154] The expedited procedure supersedes anything to the contrary in the mandamus provisions set forth in Code of Civil Procedure, Title I, chapter 4.[155]

Under that expedited procedure, the public agency, within five court days after receiving written notification from a permit applicant that the applicant will seek judicial review of the agency's action on the permit, must prepare and certify the administrative record and make it available to the applicant.[156] Either the public agency or the permit applicant may bring an action under the expedited review provisions. An action by the permit applicant must be in the form of a petition for writ of mandate under Code Civ. Proc. § 1085 or 1094.5, as appropriate.[157] The party bringing the

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[150] Baby Tam & Co., Inc. v. City of Las Vegas (1998) 154 F.3d 1097, 1101, *overruled in part by* City of Littleton v. Z. J. Gifts D-4, L.L.C. (2004) 541 U.S. 774, 124 S. Ct. 2219, 159 L. Ed. 2d 84; *see* FW/PBS, Inc. v. City of Dallas (1990) 493 U.S. 215, 226, 110 S. Ct. 596, 107 L. Ed. 2d 603; Freedman v. Maryland (1965) 380 U.S. 51, 59, 85 S. Ct. 734, 13 L. Ed. 2d 649.

[151] Baby Tam & Co., Inc. v. City of Las Vegas (1998) 154 F.3d 1097, 1101, *overruled in part by* City of Littleton v. Z. J. Gifts D-4, L.L.C. (2004) 541 U.S. 774, 124 S. Ct. 2219, 159 L. Ed. 2d 84; *see* Baby Tam & Co., Inc. v. City of Las Vegas (9th Cir. 2000) 199 F.3d 1111, 1114–1115 (form of judicial review established by city, state Legislature, and court on remand—mandamus—was constitutionally adequate, but ordinance was still facially unconstitutional because it did not set time limits within which license had to be issued); *see also* Baby Tam & Co. v. City of Las Vegas (9th Cir. 2001) 247 F.3d 1003, 1005 (city's adult business ordinance properly amended to provide for prompt decision on license application).

[152] City of Littleton v. Z. J. Gifts D-4, L.L.C. (2004) 124 S. Ct. 2219.

[153] City of Littleton v. Z. J. Gifts D-4, L.L.C. (2004) 541 U.S. 774.

[154] *See* 1999 Stats., ch. 49, § 2.

[155] Code Civ. Proc. § 1094.8(d).

[156] Code Civ. Proc. § 1094.8(d)(1).

[157] Code Civ. Proc. § 1094.8(d)(2).

action must file and serve the petition on the respondent no later than 21 calendar days following the public agency's final decision on the permit. The title page of the petition must contain the following language in 18-point type:[158]

> ATTENTION: THIS MATTER IS ENTITLED TO PRIORITY AND SUBJECT TO THE EXPEDITED HEARING AND REVIEW PROCEDURES CONTAINED IN SECTION 1094.8 OF THE CODE OF CIVIL PROCEDURE.

The clerk of the court must set a hearing for review of the petition no later than 25 calendar days from the date the petition is filed. Moving, opposition, and reply papers must be filed as provided in the California Rules of Court. The petitioner must lodge the administrative record with the court no later than 10 calendar days in advance of the hearing date.[159]

Following the hearing's conclusion, the court must render its decision in an expeditious manner consistent with constitutional requirements in view of the particular facts and circumstances. The decision must be rendered no later than 20 calendar days after the matter is submitted or 50 calendar days after the date the petition is filed, whichever is earlier.[160] If the presiding judge of the court in which the action is filed determines that, as a result of either the press of other court business or other factors, the court will be unable to meet any one or more of the deadlines, the presiding judge must request the temporary assignment of a judicial officer to hear the petition and render a decision within the time limits.[161] The parties may jointly waive any of the time limits.[162]

A public agency may designate the permits or entitlements to which these expedited review provisions apply. It may do so by adopting an ordinance or resolution containing a specific listing or other description of the permits or entitlements eligible for expedited judicial review because they regulate expressive conduct protected by the First Amendment.[163]

PRACTICE TIP: Drafting and Administering Adult Entertainment Regulations. Whether the ordinance is intended as a content-neutral time, place, and manner restriction, or requires a conditional use permit to operate an adult entertainment use, the hallmark of constitutionality is precision and a fully documented administrative record. Each of the constitutional requirements enumerated above should be satisfied in the ordinance, and evidence supporting the decision should be found in the administrative record.

In addition, local governments should treat conditional use permit applications for

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[158] Code Civ. Proc. § 1094.8(d)(3).

[159] Code Civ. Proc. § 1094.8(d)(4).

[160] Code Civ. Proc. § 1094.8(d)(5).

[161] Code Civ. Proc. § 1094.8(e).

[162] Code Civ. Proc. § 1094.8(f).

[163] Code Civ. Proc. § 1094.8(c).

adult entertainment uses like applications for licenses. This means that local governments should draft narrow, definite, and objective standards and time limits for the issuance of conditional use permits for adult entertainment uses. The ordinance should be so specific that little or no discretion is vested in the issuing agency or official.

Reasonable guidelines for drafting and administering adult entertainment zoning ordinances include the following:

- Specify the exact minimal distance required between an adult entertainment use and the nearest residential use or other sensitive use.
- Specify that a conditional use permit application must receive a public hearing and be granted or denied within 90 days from receipt of the application.
- Identify all alternative locations available at the time that a conditional use permit application is filed for an adult entertainment use.
- Build a record. Before adopting standards for adult entertainment zoning, local governments should ensure that there is ample evidence in the record showing how the restrictions in the ordinance are related to the purpose of the ordinance and how the standards imposed prevent the negative secondary effects the ordinance seeks to prevent.
- Remain informed and revise when necessary. Local counsel should review adult entertainment zoning ordinances at least every two years to ensure that the ordinance remains in conformance with prevailing law.

§ 60.64 Freedom of Religion

[1] First Amendment

U.S. Const. amend. I, guarantees the right to the free exercise of religion and prohibits laws establishing any single religion. Both the Free Exercise and Establishment Clauses of the First Amendment have been applied to the states through U.S. Const. amend. XIV.[1]

Zoning regulations may conflict with the guarantee of religious freedom in several different contexts. Zoning regulations may interfere with the activities of religious groups by preventing or limiting the establishment of places of worship in certain locations or by restricting the rights of religious groups to rebuild, expand, or alter their places of worship.[2] Local regulations may interfere with religious activities such as solicitation and merchandising.[3] Public displays of religious symbols may also violate constitutional principles prohibiting governmental promotion of religion.[4]

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[1] Cantwell v. Connecticut (1940) 310 U.S. 296, 303, 60 S. Ct. 900, 84 L. Ed. 1213.

[2] *See* § 60.64[3], *below*.

[3] *See* § 60.63[3] regarding handbills and outdoor merchandising.

[4] *See* § 60.64[4], *below*.

[2] California Constitution's Religion Clauses

The California Constitution contains guarantees of the separation of religion and state in addition to the similar guarantees found in the federal Constitution. Cal. Const. art. I, § 4, contains language virtually identical to the Establishment Clause but further guarantees the "[f]ree exercise and enjoyment of religion without discrimination or preference."[5] California courts have interpreted this "No Preference Clause" as more protective of the principle of government impartiality in the field of religion than the federal guarantee.[6]

Additionally, the California Constitution specifically prohibits any governmental appropriation or payment from public funds in aid of religion.[7] This section has been interpreted to prohibit not only material aid to religion, but also any official involvement that promotes religion,[8] consistent with the U.S. Supreme Court's holdings that prohibit sectarian aid.[9]

[3] Free Exercise Clause

[a] Regulation of Religious Activity

The Free Exercise Clause prevents state interference with the practice of religious faiths and it precludes government regulation of religious thought or belief. However, religious *activity* may be regulated if there is a compelling state need or if the regulation is neutral and of general applicability. The *U.S. Supreme Court has held* that the constitutional guarantee of religious freedom does not excuse compliance with generally applicable, religion-neutral laws that have the effect of burdening religion.[10] Thus, courts have upheld blanket zoning restrictions limiting the location, size, and other attributes of all places of assembly that incidentally restrict places of worship.

On the other hand, burdens imposed on religion by laws that are not of general application must be justified by a compelling state interest that cannot be served by less restrictive means.[11] Thus, zoning regulations which impose requirements for special exceptions, special use permits, and conditional use permits on places of worship remain subject to scrutiny under a "compelling interest" test.[12]

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[5] Cal. Const. art. I, § 4.

[6] Sands v. Morongo Unified School District (1991) 53 Cal. 3d 863, 883, 281 Cal. Rptr. 34, 809 P.2d 809, *cert. denied*, 505 U.S. 1218, 112 S. Ct. 3026, 120 L. Ed. 2d 897 (1992).

[7] Cal. Const. art. XVI, § 5.

[8] California Educational Facilities Authority v. Priest (1974) 12 Cal. 3d 593, 605 n.12, 116 Cal. Rptr. 361, 526 P.2d 513.

[9] Committee for Public Education v. Nyquist (1973) 413 U.S. 756, 786.

[10] Employment Division, Department of Human Resources of Oregon v. Smith (1990) 494 U.S. 872, 878–879, 110 S. Ct. 1595, 108 L. Ed. 2d 876, superseded on statutory grounds as recognized in Tanzin v. Tanvir (2020) 141 S. Ct. 486, 489; Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah (1993) 508 U.S. 520, 531, 113 S. Ct. 2217, 2226.

[11] Sherbert v. Verner (1963) 374 U.S. 398, 403, 83 S. Ct. 1790, 10 L. Ed. 2d 965.

[12] Christian Gospel Church v. San Francisco (9th Cir. 1990) 896 F.2d 1221, 1224.

Additionally, as with other First Amendment rights, religious activity may be subjected to content-neutral time, place, and manner restrictions that serve a significant governmental interest and leave open ample alternative forums for exercise of the right.[13]

[b] Conflict Between Free Exercise Clause and Zoning Law

[i] California Decisions

In general, California courts have held that zoning ordinances that exclude places of worship from residential districts do not unjustifiably restrict the exercise of religion. The availability of alternate accessible sites within the local jurisdiction in which to lawfully locate places of worship is an important factor. In an early case, a court of appeal upheld a city's decision to deny a building permit for a church on property zoned solely for single-family dwellings. Because the establishment of single-family residential areas is a valid exercise of the police power, and because the presence of churches could result in parking, traffic, and noise problems incompatible with single-family residential use, the court held that excluding churches from such areas was lawful.[14] Another court of appeal upheld the denial of a variance for construction of a church in a single-family residential zone and concluded that churches hold the same position as other property owners with regard to zoning. That is, churches are subject to reasonable regulation; they are not entitled to preference and are not to be subjected to discrimination.[15]

The right to exercise religion was not violated by a city's denial of a religious school's application for a lot split, where the lot split was necessary to sell off a portion of the school's property to ensure the school's continued solvency in light of earthquake damage.[16]

The U.S. Supreme Court has yet to decide a case in which the Free Exercise clause and a zoning law are squarely in conflict.[17] The Ninth Circuit Court of Appeals has addressed a Free Exercise case in which a church was denied a conditional use permit

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[13] Heffron v. Int'l Soc. for Krishna Consc. (1981) 452 U.S. 640, 647–648, 654–655, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (upholding ordinance restricting locations where religious organization could distribute and sell literature and solicit donations); *see* Cox v. New Hampshire (1941) 312 U.S. 569, 576, 61 S. Ct. 762, 85 L. Ed. 1049.

[14] Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville (1949) 90 Cal. App. 2d 656, 659–660, 203 P.2d 823, *appeal dismissed*, 338 U.S. 939, 70 S. Ct. 342, 94 L. Ed. 579 (1950); Tustin Heights Ass'n v. Board of Supervisors (1959) 170 Cal. App. 2d 619, 630, 339 P. 2d 914.

[15] Minney v. City of Azusa (1958) 164 Cal. App. 2d 12, 24, 330 P.2d 255, *appeal dismissed*, 359 U.S. 436, 79 S. Ct. 941, 3 L. Ed. 2d 932 (1959); *see* Lucas Valley Homeowners Assoc. v. County of Marin (1991) 233 Cal. App. 3d 130, 143–148, 284 Cal. Rptr. 427 (synagogue not entitled to preference under zoning laws).

[16] Ramona Convent of the Holy Names v. City of Alhambra (1993) 21 Cal. App. 4th 10, 24–25, 26 Cal. Rptr. 2d 140.

[17] Lucas Valley Homeowners Assoc. v. County of Marin (1991) 233 Cal. App. 3d 130, 143, 284 Cal. Rptr. 427.

to conduct religious services in a single-family home located in a residential zone. The court applied the "compelling interest" test and examined the following three factors:[18]

- The magnitude of the zoning regulation's impact on the exercise of the religious belief;
- Whether the regulation's burden on religion is justified by a compelling state interest; and
- The extent to which the recognition of an exemption from the zoning regulation for the place of worship would impede the government's objectives.

The court upheld the city's denial of the conditional use permit, finding that the burden on religion was minimal and related solely to the church members convenience and expense. In contrast, the city's interest in maintaining the integrity of its zoning scheme and protecting the residential quality of its neighborhoods was strong.[19]

[ii] Religious Land Use and Institutionalized Persons Act

In 2000, the United States Congress enacted the "Religious Land Use and Institutionalized Persons Act of 2000"[20] (often referred to as "RLUIPA") which in part specifies that the strict scrutiny test applies to land use regulations[21] that impose a substantial burden on the exercise of religion. RLUIPA provides that governments may not impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution,[22] unless the government demonstrates that imposition of the burden is (1) in furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering that interest.[23] This prohibition is applicable when the substantial burden:[24]

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[18] Christian Gospel Church v. San Francisco (9th Cir. 1990) 896 F.2d 1221, 1223–1224, *superseded on other grounds by* 42 U.S.C. § 20000e.

[19] Christian Gospel Church v. San Francisco (9th Cir. 1990) 896 F.2d 1221, 1224–1225, *superseded on other grounds by* 42 U.S.C. § 20000e. The court further stated that the use of the home for worship would bring "traffic and noise problems to an otherwise quiet residential neighborhood."

[20] Pub. L. No. 108-274, S. 2869.

[21] The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest. 42 U.S.C. § 2000cc-5(5). *See also* Cross Culture Christian Center v. Newsom (2020) 445 F. Supp. 3d 758, 771 (state and county stay-at-home orders issued during COVID-19 pandemic which banned mass gatherings, including in-person church services, did not constitute land use regulations as defined by RLUIPA, but rather regulated conduct).

[22] California-Nevada Annual Conference of the Methodist Church v. City and County of San Francisco (2014) 74 F. Supp. 3d 1144, 1153–1158 (a religious organization's commercial endeavors, such as the sale of property for a secular use, do not constitute "religious exercise" protected by RLUIPA, even if undertaken in order to fund the organization's religious mission).

[23] 42 U.S.C. § 2000cc(a); *see* International Church of the Foursquare Gospel v. City of San Leandro (9th Cir. 2011) 673 F.3d 1059, 1066–1067, 1070 (district court committed reversible error in granting summary judgment for city on basis that a zoning law, as a neutral law of general applicability, can impose

- Is imposed in a program or activity that receives federal financial assistance, even if the burden results from a rule of general applicability;
- Affects, or removal of that substantial burden would affect, commerce with foreign nations, among the states, or with Indian tribes, even if the burden results from a rule of general applicability; or
- Is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

RLUIPA provides that governments may not impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.[25] It further provides that governments may not impose or implement a land use regulation that (1) discriminates against any assembly or institution on the basis of religion or religious denomination; (2) totally excludes religious assemblies from a jurisdiction; or (3) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.[26] A violation of the equal terms provision of RLUIPA can be established where (1) there is an imposition or implementation of a land-use regulation, (2) by a government, (3) on a religious assembly or institution, and (4) the land-use regulation treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.[27]

Violation of RLUIPA may be asserted as a claim or defense in a judicial proceeding.[28] The plaintiff in a case claiming a violation of RLUIPA must be a religious assembly or institution.[29] A plaintiff who produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of RLUIPA bears the burden of persuasion on whether the challenged law (including a regulation) substantially burdened the plaintiff's exercise of religion. The government bears the burden of persuasion on any other element of the claim.[30] The court may award the prevailing party a reasonable attorneys' fee as part of its costs.[31]

In *San Jose Christian College v. City of Morgan Hill*, the Ninth Circuit held that the city's denial of a religious college's application to rezone property from hospital use to a place for religious education did not impose a "substantial burden" on the exercise of

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only an incidental burden and therefore does not trigger RLUIPA strict scrutiny standard; city's desire to preserve industrial zoned land for industrial uses did not constitute compelling interest).

[24] 42 U.S.C. § 2000cc(a)(2).

[25] 42 U.S.C. § 2000cc(b).

[26] 42 U.S.C. § 2000cc(b).

[27] Centro Familiar Cristiano Buenas Nuevas v. City of Yuma (2011) 651 F.3d 1163, 1170–71. *See also* Calvary Chapel Bible Fellowship v. County of Riverside (9th Cir. 2020) 948 F.3d 1172, 1176.

[28] 42 U.S.C. § 2000cc-2(a).

[29] Epona, LLC v County of Ventura (9th Cir 2017) 876 F3d 1214, 1226.

[30] 42 U.S.C. § 2000cc-2(b).

[31] 42 U.S.C. § 1988(b).

religion.[32] The plaintiff identified the substantial burden as its inability to use its own property "to carry on its mission of Christian education and transmitting its religious beliefs." However, the court stated that it appeared that the college was simply adverse to complying with the requirements of the application to rezone. The court explained that the ordinance imposed no restriction whatsoever on religious exercise; it merely required the college to submit a complete application, as required of all applicants.[33]

The court further stated that the regulations did not render religious exercise effectively impracticable. Although the ordinance might have rendered the college unable to provide education and/or worship at its property, there was no evidence that it was precluded from using other sites within the city. Finally, there was no evidence that the city would not impose the same requirements on any other entity seeking to build something other than a hospital on the property. Accordingly, the court affirmed the district court's entry of summary judgment in favor of the city on the college's RLUIPA claim.[34]

In contrast, the county violated RLUIPA by denying a conditional use permit for the construction of a Sikh temple on land zoned for agricultural use, despite the applicant's agreement to numerous conditions and the recommendation by the county planning commission that the permit be granted.[35] RLUIPA requires the permit applicant to prove that the county's denial of its application imposed a substantial burden on its religious exercise.[36] The court found that the county imposed a substantial burden based on two considerations: (1) the county's broad reasons given for its denials of the two permit applications could easily apply to all future applications by the Sikh temple; and (2) the Sikh temple had agreed to every mitigation measure suggested by the planning division, but the county, without explanation, found such cooperation insufficient. The net effect of the county's denials was to shrink the large amount of land theoretically available to the Sikh temple under the zoning code to several scattered parcels that the county might or might not ultimately approve. Because the county's actions had to a significantly great extent lessened the prospect of the applicant being able to construct a temple in the future, the county had imposed a substantial burden on its religious exercise.[37]

In *New Harvest Christian Fellowship v. City of Salinas*, the district court held that a zoning provision prohibiting ground floor assembly did not constitute a "substantial burden" on the exercise of religion due to the availability of alternative locations.[38] In evaluating whether the zoning provision constituted a "substantial burden" on the

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[32] San Jose Christian College v. City of Morgan Hill (9th Cir. 2004) 360 F.3d 1024, 1035.

[33] San Jose Christian College v. City of Morgan Hill (9th Cir. 2004) 360 F.3d 1024, 1035.

[34] San Jose Christian College v. City of Morgan Hill (9th Cir. 2004) 360 F.3d 1024, 1035.

[35] Guru Nanak Sikh Society of Yuba City v. County of Sutter (9th Cir. 2006) 456 F.3d 978, 992.

[36] 42 U.S.C. § 2000cc-2(b).

[37] Guru Nanak Sikh Society of Yuba City v. County of Sutter (9th Cir. 2006) 456 F.3d 978, 989–992.

[38] New Harvest Christian Fellowship v. City of Salinas (9th Cir. 2020) 463 F. Supp. 3d 1027, 1038 (appeal pending).

exercise of religion, the court also cited the church's awareness at the time it purchased the property that it was not zoned for assembly uses on the ground floor and its knowledge that the City would oppose the church's efforts to conduct religious services there as evidence of a self-imposed burden rather than a substantial burden under RLUIPA.[39] The court further held that the City's policy goal of stimulating commercial activity in the immediate area to establish a pedestrian-friendly, active, and vibrant environment allowed for the denial of the church use while permitting nearby ground floor assembly uses for secular, live entertainment venues.[40]

A city's revocation of a certificate of occupancy for a Scottish Rite Cathedral did not violate RLUIPA. Although the court concluded that Masonic practices come within the scope of RLUIPA, the Cathedral was being operated solely as a commercial facility. A burden on a commercial enterprise used to fund a religious organization does not constitute a substantial burden on "religious exercise" within the meaning of the Act.[41]

In *County of Los Angeles v. Sahag Mesrob Armenian Christian School*,[42] the court held that the county did not violate RLUIPA by requiring a religious school operating in property zoned for single-family residences to obtain a conditional use permit and by denying a waiver of zoning requirements pending approval of the permit. Requiring compliance with a neutral application process for a conditional use permit is not a substantial burden on religious practices within the meaning of the Act.[43]

[4] Establishment Clause

[a] Test for Determining Violation of Clause

The Establishment Clause prevents the establishment of a state religion. The United States Supreme Court has identified the following three criteria that must be satisfied for a regulation to stand under the Establishment Clause:[44]

- The regulation must have a secular legislative purpose;
- The regulation's principal or primary effect must be one that neither advances nor inhibits religion; and

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[39] New Harvest Christian Fellowship v. City of Salinas (9th Cir. 2020) 463 F. Supp. 3d 1027, 1038–1039 (appeal pending). The court cites cases from other jurisdictions which required plaintiffs to have a reasonable expectation of using the subject property for the intended religious purposes (*see* Andon, LLC v. City of Newport News, Va. (4th Cir. 2016) 813 F.3d 510, 515; Livingston Christian Schools v. Genoa Charter Township (6th Cir. 2017) 858 F.3d 996, 1004; and Petra Presbyterian Church v. Village of Northbrook (7th Cir. 2007) 489 F.3d 846, 851.)

[40] New Harvest Christian Fellowship v. City of Salinas (9th Cir. 2020) 463 F. Supp. 3d 1027, 1039–1042 (appeal pending).

[41] Scottish Rite Cathedral Assn. of Los Angeles v. City of Los Angeles (2007) 156 Cal. App. 4th 108, 119–120, 67 Cal. Rptr. 3d 207.

[42] County of Los Angeles v. Sahag-Mesrob Armenian Christian School (2010) 188 Cal. App. 4th 851, 116 Cal. Rptr. 3d 61.

[43] County of Los Angeles v. Sahag-Mesrob Armenian Christian School (2010) 188 Cal. App. 4th 851, 863, 116 Cal. Rptr. 3d 61.

[44] Lemon v. Kurtzman (1971) 403 U.S. 602, 612–613, 91 S. Ct. 2105, 29 L. Ed. 2d 745.

- The regulation must not foster an excessive government entanglement with religion.

Under this test, the Supreme Court struck down an ordinance that forbade issuing a liquor license to premises within 500 feet of a church or school if the church or school objected in writing. Although the Court found that the ordinance had a valid, secular purpose—protecting churches and schools from the disruption associated with liquor-serving establishments—the ordinance failed to meet the other two criteria of constitutionality.[45] First, the ordinance had a primary or principal effect of advancing religion by the mere appearance of a joint exercise of legislative authority by church and state.[46] Second, the substitution of the unilateral veto power of a church for the decision-making power of a legislative body constituted an enmeshing of churches in the processes of government contrary to the Establishment Clause.[47] However, simply because a landowner or operator is a religious organization does not create an entanglement between government and religion.[48]

[b] Religious Displays

The Establishment Clause has been found to prohibit various religious displays on public property. California cases concerning the constitutionality of religious displays have relied primarily on the stronger California "No Preference Clause."[49] The factors relevant to determining whether a given display on public property violates the California Constitution include the following:[50]

- The display's religious significance;
- The display's size and visibility;
- The inclusion of other religious symbols in the display;
- The display's historical background; and
- The display's proximity to government buildings or religious facilities.

Based on these factors, certain displays have been upheld. The display of an unlit historical menorah in city hall during the holiday season along with other religious objects was permissible,[51] and a private religious display permitted by a city in a public park survived scrutiny.[52] But, other displays have been prohibited. An illuminated cross

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[45] Larkin v. Grendel's Den, Inc. (1982) 459 U.S. 116, 122–124, 103 S. Ct. 505, 74 L. Ed. 2d 297.

[46] Larkin v. Grendel's Den, Inc. (1982) 459 U.S. 116, 125, 103 S. Ct. 505, 74 L. Ed. 2d 297.

[47] Larkin v. Grendel's Den, Inc. (1982) 459 U.S. 116, 127, 103 S. Ct. 505, 74 L. Ed. 2d 297.

[48] Foothill Communities Coalition v. County of Orange (2014) 222 Cal. App. 4th 1302, 1320, 166 Cal. Rptr. 3d 627, 642.

[49] *See* § 60.64[2], *above*.

[50] Ellis v. City of La Mesa (9th Cir. 1992) 990 F.2d 1518, 1525–1526 (interpreting California's "No Preference Clause").

[51] Okrand v. City of Los Angeles (1989) 207 Cal. App. 3d 566, 578–580, 254 Cal. Rptr. 913.

[52] Kreisner v. City of San Diego (9th Cir. 1993) 988 F.2d 883, 898.

on city hall during Christmas and Easter seasons violated the "No Preference Clause,"[53] and county ownership of a desert park containing religious statues also failed scrutiny.[54]

§ 60.65 Rights of Privacy and Association

[1] Federal vs. State Constitutional Rights

Challenges to zoning ordinances based on a constitutional right to privacy or association are more likely to succeed under California than federal law because, unlike the federal Constitution, the California Constitution contains an explicit right to privacy provision, guaranteeing all people the inalienable right to pursue and obtain privacy.[1] The U.S. Supreme Court has recognized the rights of privacy[2] and association (both in intimate relationships[3] and for the purpose of engaging in protected First Amendment activities)[4] not as enumerated rights but among the rights found in the penumbras of the Bill of Rights. As a result of these different levels of constitutional protection, federal and California courts have come to different conclusions about the constitutionality of zoning ordinances which try to regulate, for example, what individuals may live together in a "single-family" home.

[2] The Federal Protection

Federal courts have generally upheld local zoning ordinances against claims that the rights of privacy and association are violated by restrictions on unrelated individuals living together. The United States Supreme Court rejected a right to privacy challenge to a zoning ordinance in the Village of Belle Terre that limited occupancy of single-family dwellings to traditional families or no more than two unrelated people. The United States Supreme Court upheld the ordinance as reasonable social legislation designed to prevent overcrowding while protecting family needs and values, and it found that no fundamental federal constitutional right was presented by the case.[5]

On the other hand, the Supreme Court invalidated another local zoning ordinance in East Cleveland which limited the occupancy of a dwelling unit to members of a single family, where family was defined in such a way as to prevent a grandmother from living with her two grandsons (who were cousins but not brothers).[6] Unlike the ordinance in *Village of Belle Terre*, which permitted any individuals related by blood, adoption, or marriage to live together, the East Cleveland ordinance specified certain categories of

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[53] Fox v. City of Los Angeles (1978) 22 Cal. 3d 792, 794–795, 150 Cal. Rptr. 867, 587 P.2d 663.

[54] Hewitt v. Joyner (9th Cir. 1991) 940 F.2d 1561, 1571, *cert. denied*, 502 U.S. 1073 (1992).

[1] Cal. Const. art. I, § 1. The full text of Article I, § 1, is as follows (emphasis added):

All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and *privacy*.

[2] Griswold v. Connecticut (1965) 381 U.S. 479, 485, 85 S. Ct. 1678, 14 L. Ed. 2d 510.

[3] Roberts v. United States Jaycees (1984) 468 U.S. 609, 618–620, 104 S. Ct. 3244, 82 L. Ed. 2d 462.

[4] NAACP v. Button (1963) 371 U.S. 415, 428–429, 83 S. Ct. 328, 9 L. Ed. 2d 405.

[5] Village of Belle Terre v. Boraas (1974) 416 U.S. 1, 9, 94 S. Ct. 1536, 39 L. Ed. 2d 797.

[6] Moore v. City of East Cleveland, Ohio (1977) 431 U.S. 494, 504, 97 S. Ct. 1932, 52 L. Ed. 2d 531.

relatives who could live together. The Court found that the limited federal privacy protection provided by the Due Process Clause of the Fourteenth Amendment prohibited such a law which "slic[ed] deeply into the family itself."[7] The Court found that the constitutional right to freedom of personal choice in matters of family life protects the extended family as well as the traditional, nuclear family.

The Supreme Court rejected a right to privacy challenge to a local ordinance which prevented the renting of a motel room for less than 10 hours, except in a licensed "sexually oriented business." The Court rejected the argument that the 10-hour relationship was protected by constitutional rights of freedom of association and privacy. The Court determined that any relationships formed in the motel room in less than 10 hours were not the types of "personal bonds" which the federal constitution protects because such bonds have "played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs."[8]

[3] The California Protection

California courts have used the explicit constitutional right to privacy and private association to afford a far greater level of protection to citizens against intrusive zoning regulations that seek to regulate who may use certain types of property or how property may be used. California courts have not permitted local zoning ordinances to distinguish between related and unrelated persons in limiting occupancy in order to prevent overcrowding.

The California Supreme Court struck down a Santa Barbara ordinance requiring that all occupants of specified types of houses be members of a "family." The ordinance defined "family" as an individual, two or more people related by blood, marriage, or legal adoption, or a group of not more than five people, excluding servants, living together as a single housekeeping unit. Appellants' household consisted of 12 unrelated adults living in a 24-room, 10-bedroom, 6-bathroom house of 6,231 square feet, on a lot of at least one acre, hidden from the street by trees and a fence, and having off-street parking for at least 12 cars. The record showed no evidence of overcrowding.[9]

Viewing California's Constitution as proving a fundamental right to privacy in one's family and in one's home, the Court held that the Santa Barbara ordinance had to be justified by a compelling public interest.[10] The Court concluded that the stated goals of the ordinance (maintaining low-density areas suitable for families) were not served by the ordinance and could be served by means less restrictive of individual freedoms. For example, the ordinance did not serve the goals of maintaining a low-density neighborhood or preventing overcrowding because it placed no limit on the number of related

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[7] Moore v. City of East Cleveland, Ohio (1977) 431 U.S. 494, 499, 97 S. Ct. 1932, 52 L. Ed. 2d 531.

[8] FW/PBS, Inc. v. City of Dallas (1990) 493 U.S. 215, 237, 110 S. Ct. 596, 107 L. Ed. 2d 603, quoting Roberts v. United States Jaycees (1984) 468 U.S. 609, 618–619, 104 S. Ct. 3244, 82 L. Ed. 2d 462.

[9] City of Santa Barbara v. Adamson (1980) 27 Cal. 3d 123, 127–128, 164 Cal. Rptr. 539, 610 P.2d 436.

[10] City of Santa Barbara v. Adamson (1980) 27 Cal. 3d 123, 131, 164 Cal. Rptr. 539, 610 P.2d 436.

household members or servants. The Court noted that zoning ordinances are much less suspect when they focus on the use rather than when they inquire into the identities of the users.[11]

A similar ordinance was found to violate the right to privacy in Chula Vista where the ordinance had been enforced against 12 communal households. The Chula Vista First Baptist Church had maintained those households in single-family residences on lots ranging from 5,980 to 10,500 square feet, with occupancies varying from four to 24 unrelated people and from two to seven cars per household.[12] The court found that overcrowding was inevitable in most of these houses and that minimizing overcrowding, traffic and parking congestion, and undue financial burden on the school system were appropriate matters for regulation. Nevertheless, the ordinance's means did not substantially serve these permissible ends. To avoid interference with the right to privacy, regulation of population density should be achieved directly, by means such as tying the maximum occupancy of a house to its habitable floor area.[13] As a practical matter, cities have been reluctant to enact zoning ordinances of this kind as they would clearly restrict large families and perhaps cause a housing shortage.

[4] Other Privacy Interests

Other privacy interests asserted against intrusive zoning regulations include the right to conduct home occupations, the right to nudity and sexual freedom in the home, and the right to rent one's home or second unit. Generally, these right to privacy cases balance the importance of the asserted right against the government interest justifying the restriction. Many right to privacy cases focus on the distinction that zoning ordinances may regulate uses, but not users.[14]

Thus, an ordinance permitting home occupations only if no assistants are employed does not violate a homeowner's right to privacy or right of association.[15] The court found that the ordinance regulated the use of property, not the user's private life.[16]

Similarly, an ordinance prohibiting rentals for fewer than 30 days was upheld against a challenge based on the rights of privacy and association. The court found that the ordinance regulated the use, not the users, and that the time restriction did not dictate to whom or with whom the property owners could rent or associate.[17]

An ordinance violated the right to privacy by prohibiting accessory dwelling units in single family homes unless those units are occupied by dependents or caregivers.[18] The

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[11] City of Santa Barbara v. Adamson (1980) 27 Cal. 3d 123, 133, 164 Cal. Rptr. 539, 610 P.2d 436.

[12] City of Chula Vista v. Pagard (1981) 115 Cal. App. 3d 785, 788–789, 791, 171 Cal. Rptr. 738.

[13] City of Chula Vista v. Pagard (1981) 115 Cal. App. 3d 785, 793, 171 Cal. Rptr. 738.

[14] *See* City of Santa Barbara v. Adamson (1980) 27 Cal. 3d 123, 133, 164 Cal. Rptr. 539, 610 P.2d 436.

[15] City of Los Altos v. Barnes (1992) 3 Cal. App. 4th 1193, 1206, 5 Cal. Rptr. 2d 77.

[16] City of Los Altos v. Barnes (1992) 3 Cal. App. 4th 1193, 1201, 5 Cal. Rptr. 2d 77.

[17] Ewing v. City of Carmel-by-the-Sea (1991) 234 Cal. App. 3d 1579, 1598, 286 Cal. Rptr. 382.

[18] Coalition Advocating Legal Housing Options v. City of Santa Monica (2001) 88 Cal. App. 4th 451, 458, 105 Cal. Rptr. 2d 802, 806.

court found that the right to privacy includes the right to be left alone in one's own home. Thus, just as there is a right to choose who lives in the primary residence, there is a right to choose who lives in the secondary or accessory residence. This flows directly from the cases related to the definition of family, discussed above.

The right to privacy in the California Constitution protects the right to nudity in private homes. However, the constitutionality of a zoning ordinance prohibiting "nudist camps" was upheld where the court found that the location in question was a business and not a private home.[19] Although consensual sexual acts cannot be regulated within a private home, the right to privacy does not protect the right of a sexually oriented business to offer closed peep show booths, where legitimate government interests mandate that the booths remain open.[20] For a discussion of First Amendment and privacy protections for sexually oriented businesses, see § 60.63[4].

§ 60.66 Right to Travel

Challenges to zoning ordinances have raised the constitutional right to interstate travel, but not with success. Because the right to interstate travel is a fundamental constitutional right, legislation is subject to strict scrutiny if it directly burdens the exercise of this right by imposing penalties or disabilities on nonresidents or new residents that are not imposed on established residents. Such legislation may be sustained only on proof of a compelling need.[1]

In land use cases, the right to travel has been invoked to challenge ordinances that restrict the availability of housing in an area and therefore, it is argued, the right to establish residence in that area. The courts, however, have not found these ordinances to discriminate between residents and nonresidents or to impose significant or direct burdens on the right to travel. For example, the United States Supreme Court held that a zoning ordinance which limited the number of unrelated people who could live in a single-family dwelling did not violate the right to travel because the ordinance was not aimed at transients.[2]

A right to travel challenge to a restrictive growth control plan was rejected in dictum in a case in which the Ninth Circuit Court of Appeal held that landowners had no standing to raise the right to travel on behalf of third party non-residents.[3]

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[19] Elysium Institute, Inc. v. County of Los Angeles (1991) 232 Cal. App. 3d 408, 425–426, 283 Cal. Rptr. 688.

[20] Deluxe Theatre & Bookstore, Inc. v. City of San Diego (1985) 175 Cal. App. 3d 980, 984–985, 221 Cal. Rptr. 100.

[1] Associated Home Builders Etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 602, 135 Cal. Rptr. 41, 557 P.2d 473.

[2] Village of Belle Terre v. Boraas (1974) 416 U.S. 1, 7, 94 S. Ct. 1536, 39 L. Ed. 2d 797.

[3] Construction Industry Asso. v. Petaluma (9th Cir. 1975) 522 F.2d 897, 905, 906–907 n.13, *cert. denied*, 424 U.S. 934, 96 S. Ct. 1148, 47 L. Ed. 2d 342 (1976).

The right of intrastate travel is recognized as a basic human right protected under the California Constitution.[4] Nonetheless, the few right to travel challenges to zoning ordinances have fared no better in California courts. For example, the California Supreme Court rejected a right to travel challenge raised against an ordinance that limited building permits until certain standards for education, sewage disposal, and water supply facilities had been met. The Court refused to accept the right to travel argument or to apply strict scrutiny because the ordinance did not directly burden travel and resettlement, but merely made it more difficult for a new resident to establish a residence in the place of his or her choosing.[5]

Similarly, the California Supreme Court rejected a right to travel challenge to an ordinance that limited new zoning for residential uses for a two-year period. The ordinance prohibited rezoning land for residential development in areas of the city suffering from school overcrowding unless the affected school district certified that the party seeking the rezoning had entered into a funding agreement with the school district. The court noted that the restriction was neither permanent nor absolute. Also, it did not necessarily exclude newcomers but only diverted them to school districts with adequate school facilities.[6] A right to travel challenge to the Coastal Act of 1972 was likewise rejected because the statute's restrictions on development in the coastal zone had no chilling effect on an individual's freedom of movement and the restrictions were designed not to exclude newcomers but to protect the coastal environment.[7]

§ 60.67 Commerce Clause

Another constitutional limit on zoning regulations is the United States Constitution's prohibition against state and local government interference with interstate commerce.[1] A state or local law that does not patently discriminate against interstate commerce and is directed to legitimate local concerns, but has incidental effects on interstate commerce, does not violate the Commerce Clause unless the burden imposed on commerce is clearly excessive in relation to the asserted local benefit.[2] The extent of the burden on interstate commerce that will be tolerated depends on the nature of the local interest at stake and whether it can be met with a lesser impact on interstate commerce.[3] For example, the Ninth Circuit rejected a Commerce Clause challenge to local zoning

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[4] Cal. Const. art. I, §§ 7, 24; Tobe v. City of Santa Ana (1995) 9 Cal. 4th 1069, 1100–1101, 40 Cal. Rptr. 2d 402, 892 P.2d 1145.

[5] Associated Home Builders Etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 603, 135 Cal. Rptr. 41, 557 P.2d 473.

[6] Builders Assoc. of Santa Clara-Santa Cruz Counties v. Superior Court of Santa Clara County (1974) 13 Cal. 3d 225, 233, 118 Cal. Rptr. 158, 529 P.2d 582, *appeal dismissed*, 427 U.S. 901, 96 S. Ct. 3184, 49 L. Ed. 2d 1195 (1975).

[7] CEEED v. California Coastal Zone Conservation Com. (1974) 43 Cal. App. 3d 306, 331–333, 118 Cal. Rptr. 315.

[1] U.S. Const. art. I, § 8.

[2] Philadelphia v. New Jersey (1978) 437 U.S. 617, 624, 98 S. Ct. 2531, 57 L. Ed. 2d 475; Construction Industry Asso. v. Petaluma (9th Cir. 1975) 522 F.2d 897, 909.

[3] Philadelphia v. New Jersey (1978) 437 U.S. 617, 624, 98 S. Ct. 2531, 57 L. Ed. 2d 475.

regulations, holding that the city's restrictions on housing development were a valid exercise of the police power, rationally related to the community's social and environmental welfare, and did not discriminate against interstate commerce or disrupt its required uniformity.[4] Given this valid basis, an incidental burden on interstate commerce would not invalidate the ordinance.[5]

State and local laws are invalid under the Commerce Clause, however, if they are protectionist, that is, if they attempt to isolate the local jurisdiction from problems common to many[6] or if they favor a local business.[7] Such laws may be upheld only if the local government can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest.[8] For example, a New Jersey statute prohibiting the importation of solid waste to state landfills from outside the state was held to violate the Commerce Clause because it attempted to isolate New Jersey from a problem common to many states by erecting a barrier against the movement of solid waste in interstate trade.[9]

§ 60.68 Preemption

[1] Federal Preemption

The Supremacy Clause of the United States Constitution prohibits a state or local government from interfering with the exercise of federal power.[1] Thus, zoning regulations are invalid if they address areas preempted by federal law.

Federal preemption is a matter of congressional intent. Preemption will be found if any of the following exist:[2]

- There is an apparent congressional intent to blanket the field;
- The federal and state schemes directly conflict; or
- State intervention would burden or frustrate the full purposes and objectives of Congress.

When Congress has evidenced an intent to occupy a field of legislation, any state law within that field is preempted. When Congress has not completely displaced state regulation, state laws are preempted if they either actually conflict with federal law or

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[4] Construction Industry Asso. v. Petaluma (9th Cir. 1975) 522 F.2d 897, 909.

[5] Philadelphia v. New Jersey (1978) 437 U.S. 617, 624, 98 S. Ct. 2531, 57 L. Ed. 2d 475; Construction Industry Asso. v. Petaluma (9th Cir. 1975) 522 F.2d 897, 909.

[6] Philadelphia v. New Jersey (1978) 437 U.S. 617, 624, 628, 98 S. Ct. 2531, 57 L. Ed. 2d 475.

[7] C & A Carbone v. Town of Clarkstown (1994) 511 U.S. 383, 392, 114 S. Ct. 1677, 128 L. Ed. 2d 399.

[8] C & A Carbone v. Town of Clarkstown (1994) 511 U.S. 383, 392, 114 S. Ct. 1677, 128 L. Ed. 2d 399.

[9] Philadelphia v. New Jersey (1978) 437 U.S. 617, 628, 98 S. Ct. 2531, 57 L. Ed. 2d 475.

[1] U.S. Const. art. VI, cl. 2.

[2] Greater Westchester Homeowners Asso. v. Los Angeles (1979) 26 Cal. 3d 86, 93, 160 Cal. Rptr. 733, 603 P.2d 1329, *cert. denied*, 449 U.S. 820 (1980).

present an obstacle to accomplishment of congressional purposes and objectives.[3] Federal preemption may be explicit or implicit, but if preemption would operate to impede state powers, congressional intent must be clear and manifest, and preemption will be found only to the extent necessary to serve congressional objectives.[4] The U.S. Supreme Court refused to find that federal land management statutes demonstrated a legislative intent to preempt application of a coastal permit requirement to private mining operations on federal land within the coastal zone, because no intent to completely occupy the field of environmental regulation of mining was demonstrated.[5] Similarly, the Ninth Circuit found that federal mining law did not preempt an Oregon law temporarily restricting instream mining in beds or banks of state waters that contained indigenous salmon habitats.[6]

The California Supreme Court adjudicated the question of whether the federal Interstate Commerce Commission Termination Act of 1995 (ICCTA) preempted the application of CEQA to a railroad project that has been undertaken by a state public entity, defendant North Coast Railroad Authority (NCRA), along with lessee real party in interest, Northwestern Pacific Railroad Company (NWPCo), a private entity.[7] In *Friends of the Eel River v. North Coast Railroad Authority*, the Court held that ICCTA contemplated a national system of unified rail service regulated by the federal government, and the application of CEQA to stop the commencement of service by NWPCo would have the effect of regulating rail transportation and, thus, would be expressly pre-empted by the ICCTA.[8] However, the Court noted that when the project is owned by the state, the question arises whether an act of self-governance such as CEQA actually constitutes a regulation within the meaning of ICCTA.

In this case, the Court held that the application of CEQA was an act of self-governance. The application of CEQA to the Authority's decisions regarding the rail project was not "regulation" of rail transportation, but rather constituted an act of self-governance that was not preempted under ICCTA (though it would have been preempted if the project had been owned by a private party).[9] The Court also held that

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[3] California Coastal Com. v. Granite Rock Co. (1987) 480 U.S. 572, 581, 107 S. Ct. 1419, 94 L. Ed. 2d 577.

[4] California Coastal Com. v. Granite Rock Co. (1987) 480 U.S. 572, 581, 107 S. Ct. 1419, 94 L. Ed. 2d 577.

[5] California Coastal Com. v. Granite Rock Co. (1987) 480 U.S. 572, 582–583, 107 S. Ct. 1419, 94 L. Ed. 2d 577.

[6] Bohmker v. Oregon (9th Cir. 2018) 903 F.3d 1029, 1049. *See also* People v. Rinehart (9th Cir. 2016) 1 Cal. 5th 652, 206 Cal. Rptr. 3d 571.

[7] Friends of the Eel River v. North Coast Railroad Authority (2017) 3 Cal. 5th 677, 220 Cal. Rptr. 3d 812, *cert. denied*, 138 S. Ct. 1696 (2018).

[8] Friends of the Eel River v. North Coast Railroad Authority (2017) 3 Cal. 5th 677, 720, 220 Cal. Rptr. 3d 812, 843 *cert. denied*, 138 S. Ct. 1696 (2018).

[9] Friends of the Eel River v. North Coast Railroad Authority (2017) 3 Cal. 5th 677, 731, 220 Cal. Rptr. 3d 812, 851 *cert. denied*, 138 S. Ct. 1696 (2018).

an injunction ordering NWPCo to stop its freight operations pending NCRA's compliance with CEQA was preempted under ICCTA.[10]

[2] State Preemption

[a] State Constitutional Authority

Local legislation may be void because it conflicts with, and therefore is preempted by, general state law.[11] Cal. Const. art. XI, § 7, permits a county or city to make and enforce within its limits "all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Conflict exists if the local legislation duplicates or contradicts general law or enters an area that is fully occupied by general law.[12] As with federal preemption, preemption by state law may be either direct or implied.

[b] Test for Determining Whether State Has Preempted Local Regulation by Implication

The California Supreme Court has devised the following test for determining whether the state has preempted local regulation by implication:[13]

- The subject matter has been so fully and completely covered by general law as to clearly indicate that it is exclusively a matter of state concern;
- The subject matter has been partially covered by general law couched in terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or
- The subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.

In determining whether local regulation has been preempted by implication, the courts look to the whole purpose and scope of the state legislative scheme.[14]

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[10] Friends of the Eel River v. North Coast Railroad Authority (2017) 3 Cal. 5th 677, 738, 220 Cal. Rptr. 3d 812, 858 *cert. denied*, 138 S. Ct. 1696 (2018).

[11] Cal. Const. art. XI, § 7; Sherwin-Williams Co. v. City of Los Angeles (1993) 4 Cal. 4th 893, 897, 16 Cal. Rptr. 2d 215, 844 P.2d 534.

[12] Candid Enterprises, Inc. v. Grossmont Union High School Dist. (1985) 39 Cal. 3d 878, 885, 218 Cal. Rptr. 303, 705 P.2d 876, quoting People ex rel. Deukmejian v. County of Mendocino (1984) 36 Cal. 3d 476, 484, 204 Cal. Rptr. 897, 683 P.2d 1150; Action Apartment Assn., Inc. v. City of Santa Monica (2007) 41 Cal. 4th 1232, 63 Cal. Rptr. 3d 398.

[13] Sherwin-Williams Co. v. City of Los Angeles (1993) 4 Cal. 4th 893, 897–898, 16 Cal. Rptr. 2d 215, 844 P.2d 534; *see* Mobilepark West Homeowners Assn. v. Escondido Mobilepark West (1995) 35 Cal. App. 4th 32, 44, 41 Cal. Rptr. 2d 393 (citing *Sherwin-Williams*).

[14] Candid Enterprises, Inc. v. Grossmont Union High School Dist. (1985) 39 Cal. 3d 878, 885–886, 218 Cal. Rptr. 303, 705 P.2d 876.

[c] Planning and Zoning Law

The Planning and Zoning Law[15] expressly states the Legislature's intent to leave the maximum degree of control over local zoning matters to cities and counties[16] and has accordingly been held not to preempt the field of zoning regulation.[17] The Planning and Zoning Law also has been characterized as establishing standards and limitations on local governments rather than providing a specific grant of authority to legislate. Local government zoning authority derives directly from the police power authority conferred by the state constitution and is not delegated by statute.[18] Thus, the failure of the Planning and Zoning Law to address a particular subject does not preclude local regulation that is within a local government's police power.

[d] Subdivision Map Act

Unlike the Planning and Zoning Law,[19] the Subdivision Map Act[20] (Act) preempts local regulation of subdivisions, but the Act expressly authorizes local governments to enact certain kinds of supplementary regulation.[21] Even if not expressly authorized, the power of local governments to enact regulations may be implied as long as the local regulations reasonably relate to the purposes of the Act.[22] Thus, cases under the Act have upheld local regulations on matters covered by the Act against preemption challenges as long as the regulations do not conflict with the Act's provisions.[23] When the Act sets out a comprehensive scheme indicating legislative intent to preempt the subject, however, inconsistent local regulations are invalid. Thus, the Subdivision Map

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[15] Gov. Code § 65000 et seq.

[16] Gov. Code § 65800.

[17] Pan Pacific Properties, Inc. v. County of Santa Cruz (1978) 81 Cal. App. 3d 244, 252, 146 Cal. Rptr. 428; *but see* Save Lafayette Trees v. City of Lafayette (2019) 32 Cal. App. 5th 148, 156, 243 Cal. Rptr. 3d 636 (amendment to Gov. Code § 65009 establishing statewide statute of limitations to challenge zoning decisions made by local agencies preempts local ordinances).

[18] Scrutton v. County of Sacramento (1969) 275 Cal. App. 2d 412, 417, 79 Cal. Rptr. 872.

[19] *See* § 60.68[2][c], *above*.

[20] Gov. Code § 66410 et seq.

[21] *See, e.g.,* Gov. Code §§ 66411, 66421 (regulation of design and improvement of subdivisions), 66477, 66478, 66479 (requirements for park and recreation dedications, school site deductions, and reservations for other public uses), 66483 (imposition of fees for costs of drainage and sewer facilities), 66484 (fees as condition of map approval).

[22] Friends of Lake Arrowhead v. Board of Supervisors (1974) 38 Cal. App. 3d 497, 505, 113 Cal. Rptr. 539.

[23] Griffin Development Co. v. City of Oxnard (1985) 39 Cal. 3d 256, 261, 217 Cal. Rptr. 1, 703 P.2d 339 (condominium conversion ordinance not in conflict with Subdivision Map Act provisions regarding condominium conversions); Santa Monica Pines, Ltd. v. Rent Control Board (1984) 35 Cal. 3d 858, 868–869, 201 Cal. Rptr. 593, 679 P.2d 27 (local restrictions on removal from rental market through condominium conversion not preempted by Subdivision Map Act provisions on condominium conversion); *but see* Sequoia Park Associates v. County of Sonoma (2009) 176 Cal. App. 4th 1270, 98 Cal. Rptr. 3d 669 (state legislative actions specific to mobilehome regulation effectively preempted County ordinance imposing obligations on the subdivision of a mobilehome park upon its conversion from rental to resident-owned).

Act's merger provisions impliedly preempt a local zoning ordinance that requires, as condition to issuing a development permit, the merger of parcels that would not be subject to merger under the Act.[24]

[e] Preemption by Non-Land-Use State Legislation

Zoning regulations may be preempted by non-land-use state legislation. The mere existence of state legislation concerning a given subject, however, does not necessarily mean that local regulation in the same general area is precluded. If local regulations serve a significant local interest that may differ from one locality to another, there is a presumption in favor of the local regulation's validity.[25] Thus, a local rent control ordinance applicable to mobile homes was upheld despite state legislation addressing the relationship between mobile home residents and park owners, because mobile home parks and especially the rents charged to residents are affected by local conditions.[26] Similarly, an ordinance regulating the placement of newsracks that exhibit sexually explicit material on public rights-of-way was upheld despite statewide regulation of obscenity and proscribed sexual behavior, because local variations in conditions would bear on the use of streets and sidewalks.[27] A local ordinance prohibiting the parking or storage of inoperable vehicles on private property is not preempted by the Vehicle Code or the Penal Code.[28]

In *Sherwin-Williams Co. v. City of Los Angeles*,[29] the California Supreme Court ruled that a state Penal Code section prohibiting the sale or transfer of aerosol paint to minors did not preempt a local ordinance requiring paint retailers to display aerosol paint and broad-tipped markers out of public reach. Although both laws attempt to prevent graffiti, the Court ruled that the state law neither expressly nor implicitly covers retail

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[24] Morehart v. County of Santa Barbara (1994) 7 Cal. 4th 725, 764, 29 Cal. Rptr. 2d 804, 872 P.2d 143; *see also,* Friends of Lake Arrowhead v. Board of Supervisors (1974) 38 Cal. App. 3d 497, 505–508, 113 Cal. Rptr. 539.

[25] Palos Verdes Shores Mobile Estates, Ltd. v. City of Los Angeles (1983) 142 Cal. App. 3d 362, 374, 190 Cal. Rptr. 866; Gluck v. County of Los Angeles (1979) 93 Cal. App. 3d 121, 133, 155 Cal. Rptr. 435.

[26] Palos Verdes Shores Mobile Estates, Ltd. v. City of Los Angeles (1983) 142 Cal. App. 3d 362, 374, 190 Cal. Rptr. 866; *but see* Civ. Code § 798.17(a), (b) (expressly exempting certain mobile home rental agreements from any local ordinance or rule establishing a maximum allowable rent); Mobilepark West Homeowners Assn. v. Escondido Mobilepark West (1995) 35 Cal. App. 4th 32, 36, 41 Cal. Rptr. 2d 393 (Civ. Code § 798.17 preempts local rent control ordinance enacted by voter initiative).

[27] Gluck v. County of Los Angeles (1979) 93 Cal. App. 3d 121, 131–133, 155 Cal. Rptr. 435; *see* Big Creek Lumber Co. Inc. v. County of San Mateo (1995) 31 Cal. App. 4th 418, 423–428, 37 Cal. Rptr. 2d 159 (zoning ordinance adopting a buffer zone between commercial timber operations and residences not preempted by state Forest Practice Act).

[28] City of Costa Mesa v. Soffer (1992) 11 Cal. App. 4th 378, 384–385, 13 Cal. Rptr. 2d 735; 75 Ops. Cal. Atty. Gen. 166 (1992).

[29] Sherwin-Williams Co. v. City of Los Angeles (1993) 4 Cal. 4th 893, 16 Cal. Rptr. 2d 215, 844 P.2d 534.

displays, and the Court also found that the local ordinance did not adversely affect the concerns of transient citizens.[30]

In *IT Corp. v. Solano County Board of Supervisors*,[31] the Supreme Court held that the Hazardous Waste Control Act (HWCA)[32] did not preempt a county's authority to order specified actions to clean up a buffer zone at a hazardous waste disposal facility. The Court stated that nothing in the HWCA indicated an intent to immunize the state-authorized facility from the operation of applicable local land use regulations.[33]

The Alcoholic Beverages Control Act[34] does not preempt the field of local zoning.[35] However, a section of the Act providing that existing licensees must be allowed to continue operations despite subsequently enacted zoning ordinances, so long as the premises retain the same type of retail liquor license and are operated continuously without substantial change in mode or character of operation,[36] may preempt local ordinances directed at retail liquor stores. The court held that Bus. & Prof. Code § 23790 preempted a local ordinance directed at nuisance mitigation that required all liquor stores to obtain a conditional use permit without providing "grandfathered" rights to existing premises.[37] However, Section 23790 did not preempt a nuisance abatement ordinance that operated only in response to businesses with a documented history of nuisance problems and was not directed solely at retail liquor stores, but could apply to any industrial or commercial business which, as operated or maintained, constituted a nuisance.[38]

Section 23790 also did not preempt an ordinance establishing a program to regulate nuisances associated with retail alcoholic beverage establishments. Because an alcoholic beverage sales establishment failed to comply with the requirements of the ordinance after administrative attempts to obtain compliance, the ordinance authorized the city to seek a court order to abate a nuisance or to ask the Department of Alcohol Beverage Control to revoke the license. The ordinance was not preempted because it did not create any new authority empowering the city to halt operation of an alcoholic

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[30] Sherwin-Williams Co. v. City of Los Angeles (1993) 4 Cal. 4th 893, 905–906, 16 Cal. Rptr. 2d 215, 844 P.2d 534.

[31] IT Corp. v. Solano County Bd. of Supervisors (1991) 1 Cal. 4th 81, 2 Cal. Rptr. 2d 513, 820 P.2d 1023.

[32] Health & Safety Code § 25100 et seq.

[33] IT Corp. v. Solano County Bd. of Supervisors (1991) 1 Cal. 4th 81, 90, 2 Cal. Rptr. 2d 513, 820 P.2d 1023.

[34] Bus. & Prof. Code § 23000 et seq.

[35] Korean American Legal Advocacy Foundation v. City of Los Angeles (1994) 23 Cal. App. 4th 376, 393, 28 Cal. Rptr. 2d 530.

[36] Bus. & Prof. Code § 23790 et seq.

[37] Boccato v. City of Hermosa Beach (1994) 29 Cal. App. 4th 1797, 1807, 35 Cal. Rptr. 2d 282.

[38] San Francisco Internat. Yachting etc. v. City and County of San Francisco (1992) 9 Cal. App. 4th 672, 682, 12 Cal. Rptr. 2d 25, 31, *citing* Building Material & Construction Teamsters' Union v. Farrell (1986) 41 Cal. 3d 651, 665, 224 Cal. Rptr. 688 and Evans v. San Francisco Unified School Dist. (1989) 209 Cal. App. 3d 1478, 1483, 258 Cal. Rptr. 15.

beverage sales establishment. It merely created an administrative mechanism that might result in a third party taking action against the alcoholic beverage seller—such as abatement by a court or license revocation by the Department of Alcoholic Beverage Control.[39] Furthermore, the Act did not prevent the application of newly adopted permit revocation and plan approval processes to retail liquor establishments that were destroyed in the civil disturbances in Los Angeles in 1992, because those businesses were not "continuously in business."[40]

[f] Charter Cities

Charter cities are in a different position from general law cities with regard to state preemption because, under Cal. Const. art. XI, §§ 3 and 5, the provisions of their charters prevail over state law on so-called "municipal affairs" or matters of strictly local concern. It is also a fundamental principle of statutory construction that state laws should be construed so as not to conflict with city charters. When there is a conflict with state law on matters that go beyond purely local concern, however, the general law of the state and principles of preemption apply to charter cities.[41]

Whether a given subject is a matter of municipal or statewide concern is a question for the courts, with weight given to the Legislature's evaluation of the question[42] and doubts resolved in favor of the state's legislative authority.[43] The California Supreme Court has stated that there is no exact definition of "municipal affairs" and that what constitutes a matter of municipal or statewide concern may change over time in response to changing conditions in society.[44] In general, however, municipal action that affects people outside the municipality is a matter subject to state regulation.[45] For example, regulation by charter cities of low income housing,[46] the effective date for rent increases,[47] and homes for the handicapped[48] was preempted. In each case, the

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[39] City of Oakland v. Superior Court (1996) 45 Cal. App. 4th 740, 757–758, 53 Cal. Rptr. 2d 120.

[40] Korean American Legal Advocacy Foundation v. City of Los Angeles (1994) 23 Cal. App. 4th 376, 397–398, 28 Cal. Rptr. 2d 530.

[41] Sherwin-Williams Co. v. City of Los Angeles (1993) 4 Cal. 4th 893, 896, 16 Cal. Rptr. 2d 215, 844 P.2d 534; Bruce v. City of Alameda (1985) 166 Cal. App. 3d 18, 21, 212 Cal. Rptr. 304; City of Los Angeles v. Department of Health (1976) 63 Cal. App. 3d 473, 479–480, 133 Cal. Rptr. 771.

[42] Bruce v. City of Alameda (1985) 166 Cal. App. 3d 18, 21, 212 Cal. Rptr. 304.

[43] City of Los Angeles v. Department of Health (1976) 63 Cal. App. 3d 473, 480, 133 Cal. Rptr. 771.

[44] Committee of Seven Thousand v. Superior Court (1988) 45 Cal. 3d 491, 505, 247 Cal. Rptr. 362, 754 P.2d 708.

[45] Committee of Seven Thousand v. Superior Court (1988) 45 Cal. 3d 491, 505, 247 Cal. Rptr. 362, 754 P.2d 708.

[46] Anderson v. City of San Jose (2019) 42 Cal. App. 5th 683, 711, 255 Cal. Rptr. 3d 654, 673; Anderson v. City of San Jose (2019) 42 Cal. App. 5th 683, 711, 255 Cal. Rptr. 3d 654, 673; Bruce v. City of Alameda (1985) 166 Cal. App. 3d 18, 21–22, 212 Cal. Rptr. 304.

[47] Tri County Apartment Assn. v. City of Mountain View (1987) 196 Cal. App. 3d 1283, 1296, 242 Cal. Rptr. 438, 446.

[48] City of Los Angeles v. Department of Health (1976) 63 Cal. App. 3d 473, 479–480, 133 Cal. Rptr. 771.

courts first reviewed the state's legislative scheme and the nature of the problem addressed. They then concluded that the subject matters of the legislation transcended local boundaries and, therefore, constituted matters of statewide concern.

§ 60.69 Unlawful Delegation of Power

[1] General Rule

Legislative bodies frequently delegate certain of their duties to other bodies, agencies, or officials, and courts have recognized the necessity and practicalities of doing so.[1] However, unlawful delegation of legislative or police powers is "repugnant to the due process clause of the Fourteenth Amendment."[2] As a general rule, delegation is proper as long as there is no delegation of actual legislative power (that is, the power to make fundamental policy decisions) and sufficient standards are provided by the legislative body to guide others' implementation of its policy.[3]

[2] Delegation to Lower Administrative Bodies

The Planning and Zoning Law[4] specifically authorizes the legislative body of each city and county to delegate administrative functions to administrative bodies. The legislative body may create a planning commission to perform functions such as preparation and implementation of the general plan, administration of zoning and subdivision ordinances, and consultation with other agencies.[5] The legislative body may create a board of zoning adjustment, a zoning administrator, or both, to hear and decide applications for conditional uses, other permits, and variances.[6] It may also create a zoning board of appeals to hear and determine appeals from the decisions of the board of zoning adjustment or zoning administrator.[7]

A delegation of power is valid only if it gives the administrative body adequate standards to guide its actions. California courts, however, have upheld delegations based on very broad and general standards.[8] These broad standards are deemed

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[1] Kugler v. Yocum (1968) 69 Cal. 2d 371, 383 71 Cal. Rptr. 687, 695, citing Gaylord v. City of Pasadena (1917) 175 Cal. 433, 436.

[2] Washington ex rel. Seattle Title Trust Co. v. Roberge (1928) 278 U.S. 116, 122, 49 S. Ct. 50, 73 L. Ed. 210.

[3] Carson Mobilehome Park Owners' Ass'n v. City of Carson (1983) 35 Cal. 3d 184, 190, 197 Cal. Rptr. 284, 672 P.2d 1297; *see* Alameda County Land Use Assn. v. City of Hayward (1995) 38 Cal. App. 4th 1716, 1724–1725, 45 Cal. Rptr. 2d 752 (memorandum of understanding between cities and county which required each entity to use its best efforts to adopt certain policies into its general plan with regard to a parcel of open space, and which provided that any amendment to portion of general plans applicable to area would not be effective unless there were parallel amendments by all three entities, was impermissible delegation of legislative power).

[4] Gov. Code § 65000 et seq.

[5] Gov. Code §§ 65101, 65103.

[6] Gov. Code §§ 65900, 65901.

[7] Gov. Code §§ 65900, 65903.

[8] *See, e.g.,* Simi Rec. & Dist. v. Local Agy. Form. Comm. (1975) 51 Cal. App. 3d 648, 672, 124 Cal. Rptr. 635 (standards for LAFCO action sufficient); People v. Gates (1974) 41 Cal. App. 3d 590, 595, 116

sufficient because local governments in large urban areas must delegate broad discretionary power to administrative bodies if the community's zoning business is to be accomplished without paralyzing the legislative process.[9] Thus, it is sufficient if the delegation requires the administrative body to decide that an action will protect the general health, safety, and welfare.[10]

The California Supreme Court upheld a rent control ordinance authorizing an administrative body to approve rent increases that it determined to be just, fair, and reasonable on consideration of 12 specified factors.[11] The Supreme Court stated that an unconstitutional delegation of authority occurs only when a legislative body does either of the following:[12]

- Leaves the resolution of fundamental policy issues to others; or
- Fails to provide adequate direction for implementing that policy.

Sufficient standards were found in a sign ordinance which delegated power to a zoning official to determine "compatibility with surroundings" and to promote "public health, safety and welfare."[13] Sufficient standards were also found in a general plan land use policy that allowed development exceeding the maximum floor area ratio where sufficient community benefits were provided.[14] As long as the power to set legislative policy is not delegated, administrative bodies may be authorized to determine the details of how and by what means the policy should be attained.[15]

[3] Delegation to Property Owners

Zoning ordinances that require the consent of adjoining or nearby property owners before a zoning action is taken are subject to challenge as unlawfully delegating the zoning power to property owners. In general, such a provision is an unlawful delegation of legislative power if the legislative body is surrendering its power to regulate land use to private individuals without safeguards or standards to govern the use of private discretion.[16] If, however, the property owners' consent serves only to waive a restriction

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Cal. Rptr. 172 (standards for nonconforming use decision sufficient).

[9] Novi v. City of Pacifica (1985) 169 Cal. App. 3d 678, 682, 215 Cal. Rptr. 439; People v. Gates (1974) 41 Cal. App. 3d 590, 595, 116 Cal. Rptr. 172.

[10] Novi v. City of Pacifica (1985) 169 Cal. App. 3d 678, 682, 215 Cal. Rptr. 439; Simi Rec. & P. Dist v. Local Agy. Form. Comm. (1975) 51 Cal. App. 3d 648, 672, 124 Cal. Rptr. 635; People v. Gates (1974) 41 Cal. App. 3d 590, 595, 116 Cal. Rptr. 172.

[11] Carson Mobilehome Park Owners' Ass'n v. City of Carson (1983) 35 Cal. 3d 184, 190, 197 Cal. Rptr. 284, 672 P.2d 1297.

[12] Carson Mobilehome Park Owners' Ass'n v. City of Carson (1983) 35 Cal. 3d 184, 190, 197 Cal. Rptr. 284, 672 P.2d 1297; *see* Kugler v. Yocum (1968) 69 Cal. 2d 371, 376–377, 71 Cal. Rptr. 687, 445 P.2d 303.

[13] Rodriguez v. Solis (1991) 1 Cal. App. 4th 495, 507–510, 2 Cal. Rptr. 2d 50.

[14] Sacramentans for Fair Planning v. City of Sacramento (2019) 37 Cal. App. 5th 698, 716, 250 Cal. Rptr. 3d 261, 275.

[15] Bohannan v. City of San Diego (1973) 30 Cal. App. 3d 416, 424, 106 Cal. Rptr. 333.

[16] Eubank v. City of Richmond (1912) 226 U.S. 137, 143–144, 33 S. Ct. 76, 57 L. Ed. 156.

that was created by the legislative body to protect neighboring properties, then the provision is valid.[17]

For example, a court of appeal upheld an ordinance which permitted commercial uses in residential districts with the written consent of three quarters of the adjoining land owners and with approval by the city council after a public hearing. Although the consent of the landowners was a prerequisite to the application, the ultimate discretion whether to grant the application for commercial use remained in the city council.[18] However, the United States Supreme Court struck down a Seattle zoning ordinance that conditioned the granting of a permit for a home for the elderly solely on the consent of two thirds of the adjacent property owners.[19] The Court stated that the ordinance failed to provide government review and gave property owners the ability to withhold consent arbitrarily or for selfish reasons.[20]

A zoning ordinance that provides for imposition of land use restrictions only on the request of property owners is also an unlawful delegation, because it prevents the legislative body from imposing restrictions as an exercise of legislative power in the interest of health, safety, and welfare.[21] For example, the United States Supreme Court invalidated an ordinance that required the city to establish a building setback line for a specific parcel on the request of the owners of two thirds of the abutting property. The ordinance was found to be an unreasonable delegation of the police power, because no standards were provided and some property owners could control the property rights of others for arbitrary or improper purposes.[22]

[4] Delegation to Other Agencies and Voters

An ordinance may impose land use conditions that depend on others' actions as long as no legislative power is delegated. Thus, the California Supreme Court upheld an ordinance that permitted rezoning for residential use only if the school district certified that the party seeking rezoning had entered into an agreement to provide school facilities. The Court rejected an argument that the ordinance constituted an unlawful

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[17] 32 Ops. Cal. Atty. Gen. 145, 150 (1958); *see* CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 260, *Sources and Limitations of Zoning Power* (Matthew Bender).

[18] City of Stockton v. Frisbie & Latta (1928) 93 Cal. App. 277, 290–295, 270 P. 270; *see* Floresta, Inc. v. City Council (1961) 190 Cal. App. 2d 599, 609–610, 12 Cal. Rptr. 182 (expressions of approval or disapproval of zoning programs by property owners will not invalidate zoning ordinance as long as zoning decision does not turn on vote of property owners).

[19] Washington ex rel. Seattle Title Trust Co. v. Roberge (1928) 278 U.S. 116, 118, 49 S. Ct. 50, 73 L. Ed. 210; *see also* Coon v. Board of Public Works (1908) 7 Cal. App. 760, 764, 95 P. 913 (permit for building livery stables); Ex parte Sing Lee (1892) 96 Cal. 354, 359, 31 P. 245 (permit for operating laundry).

[20] Washington ex rel. Seattle Title Trust Co. v. Roberge (1928) 278 U.S. 116, 121–122, 49 S. Ct. 50, 73 L. Ed. 210; *see also* Larkin v. Grendel's Den, Inc. (1982) 459 U.S. 116, 125, 103 S. Ct. 505, 74 L. Ed. 2d 297 (delegation to church of veto power over liquor license applications violates Establishment Clause), discussed in § 60.64[4][a].

[21] 32 Ops. Cal. Atty. Gen. 145, 150 (1958).

[22] City of Eubank v. Richmond (1912) 226 U.S. 137, 143–144, 33 S. Ct. 76, 57 L. Ed. 156.

delegation of power to the school district. The Court found that the ordinance did not confer any power to rezone on the district but simply limited the conditions under which the legislative body could approve rezonings.[23]

A requirement that land use actions cannot take effect until approved by a referendum of the voters is not an unlawful delegation. The United States Supreme Court upheld a city charter provision requiring ratification of proposed land use changes by 55 percent of the voters, holding that the referendum is not a delegation by the legislative body but a power reserved by the people.[24] The Supreme Court distinguished the referendum from the unrestrained delegation of power to a narrow segment of the community.[25] With a referendum the power is exercised not by a narrow segment of the community, but by the people at large.[26] A referendum is the city itself legislating through its voters.[27]

Invalid consent provisions are not necessarily fatal to the entire zoning ordinance, but may be severed from the valid portions.[28]

[5] Unlawful Contracting of Police Power

Related to the concept of unlawful delegation of authority is the rule that a local legislative body may not restrict or contract away its right to exercise its police power in the future. A legislative body cannot restrict the powers of its successors by enacting legislation which purports to be nonrepealable,[29] and a local government may not contract away its right to exercise its police power in the future.[30] Any contract that purports to contract away legislative and governmental functions is invalid and unenforceable as contrary to public policy.[31]

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[23] Builders Assn. of Santa Clara-Santa Cruz Counties v. Superior Court (1974) 13 Cal. 3d 225, 231–232, 118 Cal. Rptr. 158, 529 P.2d 582, *appeal dismissed*, 427 U.S. 901, 96 S. Ct. 3184, 49 L. Ed. 2d 1195 (1975). *See also* DeVita v. County of Napa (1995) 9 Cal. 4th 763, 38 Cal. Rptr. 2d 699 (adoption of General Plan policies by initiative is not an unlawful delegation of power).

[24] Eastlake v. Forest City Enterprises, Inc. (1976) 426 U.S. 668, 675, 96 S. Ct. 2358, 49 L. Ed. 2d 132.

[25] *See, e.g.,* Washington ex rel. Seattle Title Trust Co. v. Roberge (1928) 278 U.S. 116, 121–122, 49 S. Ct. 50, 73 L. Ed. 210; City of Eubank v. Richmond (1912) 226 U.S. 137, 143–144, 33 S. Ct. 76, 57 L. Ed. 156.

[26] Eastlake v. Forest City Enterprises, Inc. (1976) 426 U.S. 668, 678, 96 S. Ct. 2358, 49 L. Ed. 2d 132.

[27] Eastlake v. Forest City Enterprises, Inc. (1976) 426 U.S. 668, 678, 96 S. Ct. 2358, 49 L. Ed. 2d 132, *quoting* Southern Alameda Span. Sp. Org. v. City of Union City, Cal. (9th Cir. 1970) 424 F.2d 291, 294.

[28] Hurst v. City of Burlingame (1929) 207 Cal. 134, 142–143, 277 P. 308, *overruled on other grounds by* Associated Home Builders etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 135 Cal. Rptr. 41, 557 P.2d 473; City of Stockton v. Frisbie & Latta (1908) 93 Cal. App. 277, 296, 270 P. 270.

[29] County of Sacramento v. Lackner (1979) 97 Cal. App. 3d 576, 589–590, 159 Cal. Rptr. 1.

[30] Avco Community Developers, Inc. v. South Coast Regional Com. (1976) 17 Cal. 3d 785, 800, 132 Cal. Rptr. 386, 553 P.2d 546, *cert. denied*, 429 U.S. 1083 (1977).

[31] Avco Community Developers, Inc. v. South Coast Regional Com. (1976) 17 Cal. 3d 785, 800, 132 Cal. Rptr. 386, 553 P.2d 546, *cert. denied*, 429 U.S. 1083 (1977); Delucchi v. County of Santa Cruz (1986) 179 Cal. App. 3d 814, 823, 225 Cal. Rptr. 43.

The crucial test is whether the local entity has *entirely* surrendered or divested itself of control of a police power or municipal function.[32] Thus, a California court of appeal invalidated a mobile home park rent control ordinance which provided that park owners could enter into a contractual agreement with the county to offer tenants a standard 15-year lease containing certain rent stabilization provisions. As an inducement to offer such rent stabilization leases, the county contractually obligated itself to exempt contracting park owners from any future rent control enacted by the county for the next 15 years. A commitment to refrain from enacting rent control for 15 years on any park whose owner had entered into such an agreement with the county was also contained in the ordinance. The court found the ordinance facially unconstitutional and the county contractual agreement invalid.[33]

In *108 Holdings Ltd. v. City of Rohnert Park,* the court held that a city did not unlawfully contract away its police power by entering into a settlement agreement and stipulated judgment to resolve litigation brought against it concerning its adoption of a new general plan.[34] In the settlement agreement, the parties "acknowledged and agreed that the judgment . . . contains provisions that will affect the City's interpretation and implementation of its General Plan when the City approves development projects and when the City evaluates those projects under CEQA and for General Plan consistency." Under the terms of the stipulated judgment, the city bound itself to interpret and apply its general plan in a manner specified in the stipulated judgment. The court concluded, however, that the settlement agreement and stipulated judgment did not amount to a surrender, abnegation, or bargaining away of the city's legislative power. Nowhere in the stipulated judgment did the city agree to refrain from legislating in the future on the matters that were the subject of the stipulated judgment, and nothing in the stipulated judgment suggested that the city had given up its authority to alter or amend its general plan in the future.[35]

In contrast, in *Trancas Property Owners Association v. City of Malibu,* the court held that a settlement of a lawsuit brought by a developer against the city seeking approval of subdivision maps was invalid because it impermissibly attempted to abrogate the city's zoning authority.[36] In the settlement, the developer agreed to record a covenant

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[32] County Mobilehome Positive Action Committee, Inc. v. County of San Diego (1998) 62 Cal. App. 4th 727, 738, 73 Cal. Rptr. 2d 409.

[33] County Mobilehome Positive Action Committee, Inc. v. County of San Diego (1998) 62 Cal. App. 4th 727, 740–741, 73 Cal. Rptr. 2d 409; *see* Alameda County Land Use Assn. v. City of Hayward (1995) 38 Cal. App. 4th 1716, 1724–1725, 45 Cal. Rptr. 2d 752 (intergovernmental memorandum of understanding concerning future general plan amendments invalid as unlawful delegation of police power and improper "contracting away" of right to exercise police power in the future).

[34] 108 Holdings Ltd. v. City of Rohnert Park (2006) 136 Cal. App. 4th 186, 195, 38 Cal. Rptr. 3d 589.

[35] 108 Holdings Ltd. v. City of Rohnert Park (2006) 136 Cal. App. 4th 186, 191–195, 38 Cal. Rptr. 3d 589.

[36] Trancas Property Owners Assn. v. City of Malibu (2006) 138 Cal. App. 4th 172, 181–182, 41 Cal. Rptr. 3d 200. *See also* Summit Media LLC v. City of Los Angeles (2012) 211 Cal. App. 4th 921, 935, 150 Cal. Rptr. 3d 574, 586 and League of Residential Neighborhood Advocates v. City of Los Angeles (9th Cir. 2007) 498 F.3d 1052, 1056.

limiting development in various ways. In turn, the city agreed that it would not enact "zoning or other ordinances applicable to the property that prohibit the construction of the residential units depicted in the final map, as limited by the terms of the covenant." The court held that this was an unlawful promise to abjure legislative zoning action, as was an agreement that the development was not required to comply with density limitations different from the density set forth in the covenant.[37]

§ 60.70 Taking Without Just Compensation

U.S. Const. amend. V, prohibits the taking of private property for public use without just compensation. Under U.S. Const. amend. XIV, this provision applies to state and local governments.[1] A zoning regulation may constitute a taking under U.S. Const. amend. V.[2] The many issues involved in determining whether a zoning ordinance or other land use regulation constitutes a taking, and the remedies that may be available to a landowner whose property has been taken by governmental regulation, are discussed in Chapter 65, *Takings and Other Constitutional Controls*.

§§ 60.71–60.79 [Reserved]

7. Nonconstitutional Limits on Zoning Power

§ 60.80 Uniformity of Zoning Regulations

The Planning and Zoning Law[1] provides that all regulations must be uniform for each class or kind of building or use of land throughout each zone, but the regulations in one type of zone may differ from those in other types of zones.[2] The statutory uniformity requirement, which is not a constitutional limitation, is intended to prevent unreasonable discrimination against or benefit to particular properties within a given zone. Only a few cases have considered this statute, and none of them have overturned challenged local regulations. Gov. Code § 65852 does not apply to charter cities, and there is no constitutional basis for strict uniformity.[3]

The uniformity that Gov. Code § 65852 requires is uniformity of uses (either of structures or land) allowed within a given zone.[4] Thus, an ordinance was upheld that

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[37] Trancas Property Owners Assn. v. City of Malibu (2006) 138 Cal. App. 4th 172, 181–182, 41 Cal. Rptr. 3d 200; *see* League of Residential Neighborhood Advocates v. City of Los Angeles (9th Cir. 2007) 498 F.3d 1052, 1057 (city bargained away police power by entering into settlement agreement allowing synagogue in area zoned solely for residential use).

[1] Dolan v. City of Tigard (1994) 512 U.S. 374, 383–384, 114 S. Ct. 2309, 129 L. Ed. 2d 304.

[2] Lingle v. Chevron U.S.A. Inc. (2005) 544 U.S. 528, 125 S. Ct. 2074, 2085, 161 L. Ed. 2d 876 (repudiating "substantially advances legitimate state interest" test for regulatory takings); Agins v. Tiburon (1979) 24 Cal. 3d 266, 277, 157 Cal. Rptr. 372, 598 P.2d 25, *aff'd*, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980).

[1] Gov. Code § 65000 et seq.

[2] Gov. Code § 65852.

[3] Sacramentans for Fair Planning v. City of Sacramento (2019) 37 Cal. App. 5th 698, 708, 250 Cal. Rptr. 3d 261; Gov. Code § 65803.

[4] Scrutton v. County of Sacramento (1969) 275 Cal. App. 2d 412, 418, 79 Cal. Rptr. 872.

authorized a conditional rezoning requiring the property owner to dedicate and improve land for streets bordering the property. The court held that the ordinance did not violate the statutory uniformity requirement because, even as conditioned, the property remained available for all uses in the same zoning classification.[5] For a discussion of conditional zoning, see § 60.11[7].

Gov. Code § 65852 requires uniform regulations, but not necessarily uniform units within a zone.[6] Therefore, a residential planned unit development does not violate the statute by allowing both single-family and multiple-family dwellings, or by allowing multiple-family dwellings that differ from one another.[7] For a discussion of planned unit developments, see § 60.12[6]. Additionally, the uniformity required by Gov. Code § 65852 is uniformity of regulations for a given condition within a zone. Thus, an ordinance limiting the location of billboards near freeways does not violate the uniformity requirement because it applies equally throughout a zone, depending only on the presence or absence of a freeway.[8]

Gov. Code § 65852 applies only to unilateral use conditions imposed on a landowner, not to consensual zoning agreements nor to conditional zoning to which a property owner has acquiesced.[9] A condition precluding the sale of intoxicating beverages did not violate the statutory uniformity requirement, even though it imposed on one parcel a condition not imposed on other property in the zone, because it was adopted at the request of and with consent of the property owner.[10]

A county's adoption of a development agreement purporting to allow property owners to operate a commercial enterprise on property zoned for exclusive agricultural use violated the zoning uniformity requirements of Gov. Code § 65852, when the county (1) did not rezone the property to a district allowing the use, (2) did not amend the zoning ordinance's text to allow the use in the existing district, (3) did not issue a conditional use permit consistent with the zoning ordinance, and (4) did not grant a variance.[11] The fact that the zoning exception was included in a development agreement[12] did not affect this result. The development agreement law does not

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[5] Scrutton v. County of Sacramento (1969) 275 Cal. App. 2d 412, 418, 79 Cal. Rptr. 872.

[6] Orinda Homeowners Committee v. Board of Supervisors (1970) 11 Cal. App. 3d 768, 773, 90 Cal. Rptr. 88.

[7] Orinda Homeowners Committee v. Board of Supervisors (1970) 11 Cal. App. 3d 768, 773, 90 Cal. Rptr. 88.

[8] Desert Outdoor Advertising, Inc. v. County of San Bernardino (1967) 255 Cal. App. 2d 765, 772, 63 Cal. Rptr. 543.

[9] J-Marion Co. v. County of Sacramento (1977) 76 Cal. App. 3d 517, 523, 142 Cal. Rptr. 723.

[10] J-Marion Co. v. County of Sacramento (1977) 76 Cal. App. 3d 517, 523, 142 Cal. Rptr. 723.

[11] Neighbors in Support of Appropriate Land Use v. County of Tuolumne (2007) 157 Cal. App. 4th 997, 1009, 68 Cal. Rptr. 3d 882.

[12] Gov. Code § 65864 et seq.

authorize cities and counties to create ad hoc forms of zoning that are not uniform and that cities and counties otherwise lack authority to create.[13]

§ 60.81 General Plan Consistency

[1] Zoning Ordinances Must Be Consistent With General Plan

A local government's general plan serves as its constitution for orderly development.[1] A county's and a general law city's zoning ordinance must be consistent with the general plan and must be amended to maintain consistency if the general plan is amended.[2] A zoning ordinance that is inconsistent with the general plan at the time of the ordinance's adoption is invalid when enacted.[3]

Prior to 2018, the consistency requirement did not apply to charter cities,[4] unless the charter city had a population of 2 million or more.[5] This meant that the consistency requirement applied to the only charter city of that size, Los Angeles. In 2018, the Legislature amended Gov. Code § 65860(d) to make the consistency requirement applicable to all charter cities.[6]

Gov. Code § 65860 establishes the following two requirements for the consistency of zoning ordinances:[7]

- The city or county must have officially adopted a general plan; and
- The land uses authorized by the ordinance must be compatible with the objectives, policies, general land uses, and programs specified in the plan.

The absence of a valid general plan precludes enactment of valid zoning regulations.[8]

PRACTICE TIP: The Order of Enactments Is Important. Complex developments often need multiple approvals by the local government, such as a general plan amendment, conditional use permit (CUP), zone change, and development agreement. In such cases, it is essential to order the sequence of approvals

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[13] Neighbors in Support of Appropriate Land Use v. County of Tuolumne (2007) 157 Cal. App. 4th 997, 1014, 68 Cal. Rptr. 3d 882. For coverage of development agreements, see Ch. 74, *Development Agreements and Other Negotiated Land Use Agreements*.

[1] For a discussion of general plans, see Ch. 62, *Planning*.

[2] Gov. Code § 65860(a), (c).

[3] Lesher Communications, Inc. v. City of Walnut Creek (1990) 52 Cal. 3d 531, 538, 277 Cal. Rptr. 1, 802 P.2d 317; DeBottari v. City Council of Norco (1985) 171 Cal. App. 3d 1204, 1212, 217 Cal. Rptr. 790; Sierra Club v. Bd. of Supervisors (1981) 126 Cal. App. 3d 698, 704, 179 Cal. Rptr. 261.

[4] Gov. Code § 65803.

[5] Former Gov. Code § 65860(d).

[6] 2018 Cal. Stats., ch. 856 (SB 1333), § 6.

[7] Gov. Code § 65860(a).

[8] Resource Defense Fund v. County of Santa Cruz (1982) 133 Cal. App. 3d 800, 806, 184 Cal. Rptr. 371.

according to legal prerequisites. Because the zone change, development agreement, and CUP must be consistent with the general plan, the local government must adopt the general plan amendment first. If the general plan amendment is not adopted, the zone change, development agreement, and CUP will be invalid the moment they are enacted because they will be inconsistent with the existing general plan. This error in the timing of enactments cannot be remedied by subsequent enactment of the general plan amendment, because the inconsistency occurred at the time of approval. Therefore, the remedy would be to readopt all necessary approvals in the correct legal order.

[2] Zoning Ordinances Adopted by Initiative

The consistency requirement generally applies to zoning ordinances adopted by initiative or challenged by referendum. Thus in *DeBottari v. City Council of Norco*[9] a city council's decision not to submit a certified referendum petition to the voters was upheld because repeal of the ordinances challenged by the petition would result in the subject property being zoned in a manner inconsistent with the city's general plan.[10] The court rejected several suggestions for remedial action that might have cured the inconsistency because a zoning ordinance that is inconsistent with the general plan at the time of its enactment is invalid when passed.[11] Even judicial deference to the electoral process cannot sacrifice the consistency requirement on which the land use law is based.[12]

However, in *City of Morgan Hill v. Bushey*,[13] the California Supreme Court disapproved the reasoning in *deBottari* and held that the voters can challenge, by referendum, a zoning ordinance amendment adopted by the local government that would bring that ordinance into compliance with an amendment to the local general plan. The challenge was proper even though such a referendum would temporarily leave in place a zoning ordinance that is inconsistent with the general plan, at least where other consistent zoning options or processes may be available to the local government.[14] The Court observed that Gov. Code § 65860(c) contemplates some temporary inconsistency between the zoning ordinance and the general plan for a

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[9] DeBottari v. City Council of Norco (1985) 171 Cal. App. 3d 1204, 217 Cal. Rptr. 790.

[10] DeBottari v. City Council of Norco (1985) 171 Cal. App. 3d 1204, 1208, 217 Cal. Rptr. 790; *see* City of Irvine v. Irvine Citizens Against Overdevelopment (1994) 25 Cal. App. 4th 868, 879, 30 Cal. Rptr. 2d 797 (withholding of inconsistent zoning referendum justified by charter city where consistency requirement adopted by ordinance).

[11] DeBottari v. City Council of Norco (1985) 171 Cal. App. 3d 1204, 1212, 217 Cal. Rptr. 790.

[12] DeBottari v. City Council of Norco (1985) 171 Cal. App. 3d 1204, 1212, 217 Cal. Rptr. 790.

[13] City of Morgan Hill v. Bushey (2018) 5 Cal. 5th 1068, 236 Cal. Rptr. 3d 835, 423 P.3d 960.

[14] City of Morgan Hill v. Bushey (2018) 5 Cal. 5th 1068, 1080–1081, 236 Cal. Rptr. 3d 835, 423 P.3d 960. The Court disapproved of the reasoning in deBottari v. City Council (1985) 171 Cal. App. 3d 1204, 1212, 217 Cal. Rptr. 790 (such a referendum would "enact" an invalid zoning ordinance that would be inconsistent with the general plan) and City of Irvine v. Irvine Citizens Against Overdevelopment (1994) 25 Cal. App. 4th 868, 874–879, 30 Cal. Rptr. 2d 797 (following *deBottari*).

"reasonable time" when the general plan is modified. The Court thus distinguished between the creation of a new inconsistency, which is invalid, and a referendum that returns the jurisdiction's zoning ordinance to an inconsistency created by the general plan amendment. The Court vacated the court of appeal judgment, remanding the case to address the factual question of whether other zoning options were available.

A referendum vote that prohibited the enactment of an ordinance prezoning unincorporated property to low density residential did not create inconsistency with the city's general plan.[15] Although annexation and development of the property as low density residential would have been consistent with the general plan, it did not follow that failing to prezone the property created an inconsistency with the general plan. Nothing in the plan required the city to take action with regard to the property at any particular time. The fact the general plan recognized a need for additional housing and recognized the property as an appropriate location for additional housing created no mandate for immediate prezoning and development. There was no inconsistency because the property had never been zoned in a manner permitting the usage contemplated by the general plan, and the referendum did not rezone the property to preclude low density residential housing. Rather, it simply preserved the status quo.[16]

PRACTICE TIP: Ballot Box Zoning: The courts give great deference to the electorate's exercise of its reserved powers of initiative and referendum with respect to amendments to local general plans and zoning ordinances, commonly known as "ballot box planning." If you represent a developer, be mindful of all deadlines and requirements to challenge a zoning ordinance by referendum and be prepared to address any such electorate campaign regarding your project.

§ 60.82 Vested Rights

[1] Vested Rights and Equitable Estoppel

The doctrines of vested rights and equitable estoppel are related doctrines based on fairness. Both doctrines provide equitable relief from the harsh consequences arising when local government action unfairly frustrates the reasonable expectations of the affected party who has relied in good faith on government representations, approvals, or permits. Most vested rights cases involve arguments for both vesting and equitable estoppel.

In the zoning context, estoppel claims typically arise when a landowner or developer asserts that the government is estopped from enforcing new regulations on an already approved but unbuilt project or from revoking a previously issued permit or approval. The doctrine of estoppel provides that the party to be estopped may not deny the existence of a set of facts if that party led another to believe those facts to be true, and

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[15] Merritt v. City of Pleasanton (2001) 89 Cal. App. 4th 1032, 1038, 107 Cal. Rptr. 2d 675.

[16] Merritt v. City of Pleasanton (2001) 89 Cal. App. 4th 1032, 1036–1037, 107 Cal. Rptr. 2d 675.

the other party relied on that belief to his or her detriment.[1] The following four elements must be present to apply the doctrine of equitable estoppel:[2]

- The party to be estopped must be apprised of the facts;
- The party to be estopped must intend that his or her conduct must be acted on, or must so act that the party asserting the estoppel had the right to believe it was so intended;
- The other party must be ignorant of the true state of facts; and
- The party to be estopped must rely on the conduct to his or her injury.

Generally, a government entity is entitled to government immunity against a claim of estoppel. However, in California, estoppel against the government may be found in certain instances where the injustice suffered is weighed again harm to the public interest. Thus, the rule is stated: "The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel."[3] Courts, however, will rarely apply equitable estoppel against a government entity. The government will be estopped only in "the most extraordinary case, where the injustice is great and the precedent set by the estoppel is narrow."[4] An equitable estoppel will not be applied to a government when doing so would nullify a strong rule of policy adopted for the benefit of the public.[5]

Thus, in a case involving a proposed shopping center, the court weighed the environmental consequences of the proposed shopping center against the harm to the developer, who had not obtained any building permits or begun construction, and found that the regional planning agency was not estopped from reexamining the previously approved project.[6] Similarly, a developer's interest in continued commercial zoning six years after the property had been annexed by an agreement that was contingent on the commercial zoning was insufficient to outweigh the public interest in planning and growth control.[7]

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[1] Evid. Code § 623; City of Long Beach v. Mansell (1970) 3 Cal. 3d 462, 488–489, 91 Cal. Rptr. 23, 476 P.2d 423 (elements of estoppel claim).

[2] City of Long Beach v. Mansell (1970) 3 Cal. 3d 462, 489, 91 Cal. Rptr. 23, 476 P.2d 423, *quoting* Driscoll v. City of Los Angeles (1967) 67 Cal. 2d 297, 305, 61 Cal. Rptr. 661, 431 P.2d 245.

[3] City of Long Beach v. Mansell (1970) 3 Cal. 3d 462, 496–497, 91 Cal. Rptr. 23, 476 P.2d 423.

[4] Smith v. County of Santa Barbara (1992) 7 Cal. App. 4th 770, 775, 9 Cal. Rptr. 2d 120.

[5] City of Long Beach v. Mansell (1970) 3 Cal. 3d 462, 493, 91 Cal. Rptr. 23, 476 P.2d 423.

[6] Raley v. California Tahoe Regional Planning Agency (1977) 68 Cal. App. 3d 965, 976, 137 Cal. Rptr. 699; *see* Pettitt v. City of Fresno (1973) 34 Cal. App. 3d 813, 820, 822–823, 110 Cal. Rptr. 262, *appeal dismissed*, 419 U.S. 810, 95 S. Ct. 24, 42 L. Ed. 2d 37 (1974) (vital public interest in zoning outweighs injustice in denying variance to individual who relied on invalid building permit erroneously issued by city).

[7] Carty v. City of Ojai (1978) 77 Cal. App. 3d 329, 343, 143 Cal. Rptr. 506.

The government may be estopped from enforcing new zoning regulations enacted solely to frustrate a particular development project, as in "spot zoning."[8] In addition, the government may be estopped when the public interest in enforcing a regulation is negligible.[9]

[2] Vested Rights Doctrine

[a] Vested Right Defined

The vested rights doctrine is a specialized application of estoppel.[10] A "vested right" is the right to complete construction and to use the property as authorized by a validly issued permit.[11] The doctrine limits the power of a locality to impose more restrictive zoning regulations on the developer of a site after a certain point in the permitting process or after actual development of the site has occurred. A vested right protects the developer and property owner from the prospect of subsequent downzoning, permit revocation,[12] or imposition of new regulations.[13] Vested rights may be created in three different ways: by judicial doctrine; by state statute; or by local ordinance.[14]

[b] The *Avco* Test

California courts have adopted a narrow version of the common law vested rights judicial doctrine. In the leading California case, *Avco Community Developers, Inc. v. South Coast Regional Commission Mission*,[15] the California Supreme Court held that a developer had not acquired vested rights to complete a residential subdivision project subject to the newly enacted Coastal Act when the developer had subdivided, graded, and improved the land, but had not received a building permit for any individual structure. Under *Avco*, a developer acquires a vested right to complete construction only when it has "performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government,"[16] and then only according to

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[8] Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal. 3d 110, 126 n.11, 109 Cal. Rptr. 799, 514 P.2d 111; *see* G & D Holland Construction Co. v. City of Marysville (1970) 12 Cal. App. 3d 989, 994–995, 91 Cal. Rptr. 227 (standard of review when spot zoning alleged); *see also* § 60.62[1] (spot zoning); *but see* Stubblefield Construction Co. v. City of San Bernardino (1995) 32 Cal. App. 4th 687, 710–711, 38 Cal. Rptr. 2d 413 (actions taken by city council to prevent development of specific property, including amendment of zoning ordinances and revisions to city's general plan, were not arbitrary deprivation of developer's due process rights, because actions were general in nature and applied to number of other development projects).

[9] Anderson v. City of La Mesa (1981) 118 Cal. App. 3d 657, 661, 173 Cal. Rptr. 572.

[10] Avco Community Developers, Inc. v. South Coast Regional Com. (1976) 17 Cal. 3d 785, 793, 132 Cal. Rptr. 386, 553 P.2d 546, *cert. denied*, 429 U.S. 1083, 97 S. Ct. 1089, 51 L. Ed. 2d 529 (1977).

[11] County of San Diego v. McClurken (1951) 37 Cal. 2d 683, 691, 234 P.2d 972.

[12] *See* § 60.31[3].

[13] *See* §§ 60.90–60.93 for a discussion of the related concept of nonconforming uses.

[14] *Davidson v. County of San Diego* (1996) 49 Cal. App. 4th 639, 647, 56 Cal. Rptr. 2d 617.

[15] Avco Community Developers, Inc. v. South Coast Regional Com. (1976) 17 Cal. 3d 785, 793, 132 Cal. Rptr. 386, 553 P.2d 546, *cert. denied*, 429 U.S. 1083, 97 S. Ct. 1089, 51 L. Ed. 2d 529 (1977).

[16] Avco Community Developers, Inc. v. South Coast Regional Com. (1976) 17 Cal. 3d 785, 791, 132

the permit's terms. The vested rights doctrine allows the government to change its mind "virtually up to the moment the builder starts pouring concrete."[17]

Under the *Avco* test, the following four elements are required before a court will recognize a vested right:[18]

- The issuance of a permit by the government authorizing the construction or use;
- The performance of substantial work;
- The incurring of substantial financial liability; and
- Good faith reliance on the permit by the developer.

These elements are discussed in § 60.82[2][c]–[f], *below*.

[c] Issuance of Permit

A vested right will not be recognized unless a permit has been issued by the government authorizing the construction or use. Zoning itself creates no vested right. Thus, neither purchasing a property nor incurring predevelopment costs in reliance on existing zoning creates a vested right against future zoning changes or imposition of additional regulations.[19] Nor is mere assurance by a government official that the use is allowed under existing zoning sufficient to create a vested right.[20] A landowner had no vested right to proceed with development under previous zoning laws.[21] Unauthorized work without a valid permit from the correct agency cannot be the basis for a vested right.[22]

Merely applying for a permit is not sufficient to create a vested right.[23] A change in zoning or other regulation enacted after a permit application, however, may amount to arbitrary and discriminatory action if the enactment is designed to frustrate the applicant's plans. In such a case, a court may decide based on estoppel to apply the law in force at the time of application despite the absence of a vested right.[24]

Cal. Rptr. 386, 553 P.2d 546, *cert. denied*, 429 U.S. 1083, 97 S. Ct. 1089, 51 L. Ed. 2d 529 (1977).

[17] Raley v. California Tahoe Regional Planning Agency (1977) 68 Cal. App. 3d 965, 985, 137 Cal. Rptr. 699.

[18] Avco Community Developers, Inc. v. South Coast Regional Com. (1976) 17 Cal. 3d 785, 791, 132 Cal. Rptr. 386, 553 P.2d 546, *cert. denied*, 429 U.S. 1083, 97 S. Ct. 1089, 51 L. Ed. 2d 529 (1977).

[19] Anderson v. City Council (1964) 229 Cal. App. 2d 79, 88–90, 40 Cal. Rptr. 41.

[20] Anderson v. City Council (1964) 229 Cal. App. 2d 79, 82, 88–90, 40 Cal. Rptr. 41.

[21] Stubblefield Construction Co. v. City of San Bernardino (1995) 32 Cal. App. 4th 687, 708, 38 Cal. Rptr. 2d 413.

[22] Attard v. Board of Supervisors of Contra Costa County (2017) 14 Cal. App. 5th 1066, 223 Cal. Rptr. 3d 521.

[23] Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal. 3d 110, 125, 109 Cal. Rptr. 799, 514 P.2d 111 (permit can be revoked after permit application on basis of zoning change unless substantial improvements have been made).

[24] Sunset View Cemetery Assn. v. Kraintz (1961) 196 Cal. App. 2d 115, 122–123, 16 Cal. Rptr. 317.

No vested right is recognized when an issued permit is invalid from the outset, even if the issuing agency is at fault.[25] In the view of at least one court, the public interest in eliminating uses not conforming to the city's zoning ordinance outweighs the permit holder's interest in continuing a use undertaken in good faith reliance on an apparently valid permit.[26]

The *Avco* case[27] stands for the proposition that a building permit—that is, the last governmental permit required before commencement of actual construction activity—is required to confer vested rights.[28]

The *Avco* building permit requirement has been strictly applied. It has been held that a tentative map approval gives rise only to a right to final map approval once the conditions of the tentative approval are satisfied, not to a vested right to build.[29] Similarly, an allocation of the number of dwelling units that could be built under an interim development control ordinance did not create a vested right to proceed with a project.[30] A developer who had obtained no permits or preliminary approvals could not invoke vested rights or estoppel based on the town's resolution, after only conceptual informal review, that a "clustered" design would meet open space requirements.[31]

Vested rights, if created, only extend to the level of construction or use authorized under the specific permit issued. For instance, issuance of a grading permit, along with the requisite initiation of actual grading work, creates a vested right only to complete

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[25] Pettitt v. City of Fresno (1973) 34 Cal. App. 3d 813, 824, 110 Cal. Rptr. 262.

[26] Pettitt v. City of Fresno (1973) 34 Cal. App. 3d 813, 824, 110 Cal. Rptr. 262.

[27] *See* § 60.82[2][b], *above*.

[28] Dicta in *Avco* implies that a right to develop may vest at a point short of the issuance of a building permit, when a final governmental authorization akin to a building permit is granted. *See* Avco Community Developers, Inc. v. South Coast Regional Com. (1976) 17 Cal. 3d 785, 793–794, 132 Cal. Rptr. 386, 553 P.2d 546, cert. denied, 429 U.S. 1083, 97 S. Ct. 1089, 51 L. Ed. 2d 529 (1977) ("in rare situations the government may grant another type of permit, such as a conditional use permit, which affords substantially the same specificity and definition to a project as a building permit"); Raley v. California Tahoe Regional Planning Agency (1977) 68 Cal. App. 3d 965, 975 n. 5, 137 Cal. Rptr. 699; Aries Dev. Co. v. California Coastal Zone Conservation Com. (1975) 48 Cal. App. 3d 534, 544, 122 Cal. Rptr. 315.

[29] Blue Chip Properties v. Permanent Rent Control Bd. (1985) 170 Cal. App. 3d 648, 661, 216 Cal. Rptr. 492; *see* Laguna Village, Inc. v. County of Orange (1985) 166 Cal. App. 3d 125, 131–132, 212 Cal. Rptr. 267 (no vested right to be free of exaction imposed after tentative map approval); Del Mar v. California Coastal Com. (1984) 152 Cal. App. 3d 49, 52, 199 Cal. Rptr. 225 (tentative map approval created no vested right to divide for landowner who failed to perform conditions as required for final map approval); Aries Dev. Co. v. California Coastal Zone Conservation Com. (1975) 48 Cal. App. 3d 534, 546, 122 Cal. Rptr. 315 (tentative map approval does not create vested right when approval of environmental impact report, a discretionary act, had not occurred); *but see* El Patio v. Permanent Rent Control Bd. (1980) 110 Cal. App. 3d 915, 927, 168 Cal. Rptr. 276 (locality could not impose new conditions on subdivision after tentative map approval).

[30] Consaul v. City of San Diego (1992) 6 Cal. App. 4th 1781, 1797, 8 Cal. Rptr. 2d 762.

[31] Toigo v. Town of Ross (1998) 70 Cal. App. 4th 309, 320, 82 Cal. Rptr. 2d 649.

grading, not to construct buildings.[32] Similarly, approval of a subdivision map for condominium conversion will not create a vested right to complete the conversion if the local condominium conversion ordinance requires a subsequent permit to remove rental units from the market.[33]

In a multi-phase development project, vested rights extend only to those phases specifically permitted and under construction, not to the project as a whole.[34] The financial interdependence of separate development phases is not sufficient to create an overall vested right.[35] The functional interdependence of buildings within an integrated multibuilding development, however, may create a vested right to complete the entire development even though the developer has not begun construction on each of the buildings, if the entire development has been permitted and at least some construction has begun.[36] However, even in a phased project, vested rights may be lost if the developer fails to proceed expeditiously.[37]

Permit conditions may defeat a vested rights claim by the permit holder. A local government may revoke even a vested right if the permitholder fails to comply with conditions in the permit.[38] Similarly, language that reserves the locality's right to impose specific conditions in the future will be enforced even if the project has commenced. The California Supreme Court held that a permit holder could not claim a vested right to be free of a transit fee that was not required when the permit was issued, because the permit required participation in a transit assessment district should such a mechanism be established by the City.[39]

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[32] Spindler Realty Corp. v. Monning (1966) 243 Cal. App. 2d 255, 264–268, 53 Cal. Rptr. 7, *cert. denied*, 385 U.S. 975.

[33] Santa Monica Pines, Ltd. v. Rent Control Board (1984) 35 Cal. 3d 858, 866, 201 Cal. Rptr. 593, 679 P.2d 27; *see* La Canada Flintridge Dev. Corp. v. Dept. of Transp. (1985) 166 Cal. App. 3d 206, 219, 212 Cal. Rptr. 334 (developer may not rely on city approvals to estop state Department of Transportation from requiring encroachment permit); In re Park Beyond the Park (Bankr. 9th Cir. 1993) 157 B.R. 887, 890 (developer who had conditional use permit for high-tech office and high-end commercial uses had no vested right in using property for courtroom space).

[34] Oceanic California, Inc. v. North Central Coast Regional Com. (1976) 63 Cal. App. 3d 57, 79–80, 133 Cal. Rptr. 664, *appeal dismissed*, 431 U.S. 951, 97 S. Ct. 2668, 53 L. Ed. 2d 267.

[35] Urban Renewal Agency v. California Coastal Zone Conservation Com. (1975) 15 Cal. 3d 577, 587, 125 Cal. Rptr. 485, 542 P.2d 645.

[36] Sierra Club v. California Coastal Zone Conservation Com. (1976) 58 Cal. App. 3d 149, 157, 129 Cal. Rptr. 743; 56 Ops. Cal. Atty. Gen. 200, 208–209 (1973).

[37] Lakeview Development v. South Lake Tahoe (9th Cir. 1990) 915 F.2d 1290, 1298–1299, *cert. denied*, 501 U.S. 1251, 111 S. Ct. 2890, 115 L. Ed. 2d 1055 (1991) (12-year delay in starting third phase of three-phase project).

[38] O'Hagen v. Board of Zoning Adjustment (1971) 19 Cal. App. 3d 151, 158, 96 Cal. Rptr. 484; *see* § 60.31[3] (modification and revocation of conditional use permits).

[39] Russ Bldg. Partnership v. City and County of San Francisco (1988) 44 Cal. 3d 839, 846–847, 854, 244 Cal. Rptr. 682, 750 P.2d 324; *see* Blue Jeans Equities West v. City and County of San Francisco (1992) 3 Cal. App. 4th 164, 166, 172, 4 Cal. Rptr. 2d 114 (same transit fee applied to developer whose permit contained condition providing that project's owner "shall make a good faith effort to participate in future

[d] Performance of Substantial Work

The *Avco* substantial work requirement is applied to mean that actual physical work pursuant to the valid permit must be performed on the project site. California cases have implied that actual physical construction, not just demolition, predevelopment, or site preparation work, is a prerequisite to acquiring a vested right to complete construction.[40]

[e] Incurring of Substantial Financial Liability

Substantial financial liability must also be incurred in good faith reliance upon a permit. This means that the financial liabilities must be directly related to the permitted work and be incurred after the issuance of the permit.[41] The requirement that substantial financial liability be incurred has been viewed both in relative and in absolute terms.[42] The smaller the project, the more likely that a relative test will be applied, with the court considering the ratio of the liability incurred to the expected project cost. In larger projects, the size of the liability standing alone will be considered whether or not it represents only a small fraction of the total project cost.[43] In California vested rights cases, the relative test of substantiality seems to be used most often.[44]

Only liability that is incurred after issuance of the final discretionary governmental approval, and is incurred lawfully within the terms of the permit, should be factored into the substantial liabilities calculation.[45] An expenditure made after more restrictive regulations are enacted is considered a calculated risk, not an expenditure made in good faith reliance on a permit, and thus should also be excluded from the determination.[46]

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funding mechanisms to assure adequate transit service to the area of the city in which the project is located").

[40] Raley v. California Tahoe Regional Planning Agency (1977) 68 Cal. App. 3d 965, 977–978, 137 Cal. Rptr. 699 (developer seeking vested right had poured no concrete); San Diego Coast Regional Com. v. See the San Diego Coast Regional Com. (1973) 9 Cal. 3d 888 (actual construction required under coastal zone vested rights statute).

[41] Aries Dev. Co. v. California Coastal Zone Conservation Com. (1975) 48 Cal. App. 3d 534, 549, 122 Cal. Rptr. 315; Spindler Realty Corp. v. Monning (1966) 243 Cal. App. 2d 255, 264–268, 53 Cal. Rptr. 7, *cert. denied*, 385 U.S. 975.

[42] Cooper v. County of Los Angeles (1975) 49 Cal. App. 3d 34, 42, 122 Cal. Rptr. 464 ("substantial" has connotations of both quantity and comparison).

[43] Cooper v. County of Los Angeles (1977) 69 Cal. App. 3d 529, 538, 138 Cal. Rptr. 229.

[44] *See* Goat Hill Tavern v. City of Costa Mesa (1992) 6 Cal. App. 4th 1519, 1529, 8 Cal. Rptr. 2d 385 (expenditure of $1.75 million to expand a tavern sufficient to vest right where revocation of permit would essentially close business); Aries Dev. Co. v. California Coastal Zone Conservation Com. (1975) 48 Cal. App. 3d 534, 549, 122 Cal. Rptr. 315 (expenditure of $28,300 relative to total project cost of over $2.26 million was not substantial as matter of law); Santa Monica Pines, Ltd. v. Rent Control Board (1984) 35 Cal. 3d 858, 867–868, 201 Cal. Rptr. 593, 679 P.2d 27 (expenditure for condominium conversion of $1,709 on building worth $2.2 million is not substantial).

[45] Aries Dev. Co. v. California Coastal Zone Conservation Com. (1975) 48 Cal. App. 3d 534, 549–550, 122 Cal. Rptr. 315; South Coast Regional Com. v. Higgins (1977) 68 Cal. App. 3d 636, 645–646, 137 Cal. Rptr. 551.

[46] Santa Monica Pines, Ltd. v. Rent Control Board (1984) 35 Cal. 3d 858, 867, 201 Cal. Rptr. 593, 679 P.2d 27.

[f] Good Faith Reliance by Developer

The final requirement of the *Avco* test is that the developer must have relied in good faith on the permit. Lack of good faith has been found when a developer undertakes development while harboring substantial doubts about having the necessary authorization for its actions, or when a developer speeds up development activity to escape the impending adoption of stricter regulations.[47]

A vested right requires more than a good faith subjective belief. Reliance must be objectively reasonable.[48] Warnings given to a permit holder of impending regulation changes may also counter a reliance claim. One cannot rely in good faith on a government permit when the government itself expressly counsels against reliance.[49] Conversely, a government may be estopped from requiring further permits after it has determined that no further permits are needed or has otherwise acquiesced in the permit holder's activities, and the permit holder has relied on this determination or acquiescence in good faith.[50]

[3] Vested Rights Created by Statute or Ordinance

In response to the significant burden that developers face in claiming a vested right under the *Avco* test,[51] the state Legislature enacted two statutory mechanisms to obtain vested rights at an earlier point in the development process: (1) the statutory development agreement; and (2) a vesting subdivision map. The *Avco* case and subsequent vested rights cases have demonstrated that the common law prerequisites to vested rights may not be workable for modern, complex multi-phased development projects where substantial financial commitments are required before obtaining final building permits for individual structures. Thus, the Planning and Zoning Law[52] now authorizes local governments and property owners to enter into binding development agreements that are enforceable despite subsequent changes in the general plan, zoning, subdivision regulation, or building regulations.[53] The Subdivision Map Act[54] similarly

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[47] Aries Dev. Co. v. California Coastal Zone Conservation Com. (1975) 48 Cal. App. 3d 534, 548, 122 Cal. Rptr. 315; South Coast Regional Com. v. Higgins (1977) 68 Cal. App. 3d 636, 646, 137 Cal. Rptr. 551; McCarthy v. California Tahoe Regional Planning Agency (1982) 129 Cal. App. 3d 222, 233, 180 Cal. Rptr. 866; 56 Ops. Cal. Atty. Gen. 200, 206–207 (1973).

[48] Russ Bldg. Partnership v. City and County of San Francisco (1988) 44 Cal. 3d 839, 853, 244 Cal. Rptr. 682, 750 P.2d 324 (permit holder's self-serving interpretation of ambiguously phrased permit condition did not justify reliance).

[49] McCarthy v. California Tahoe Regional Planning Agency (1982) 129 Cal. App. 3d 222, 233, 180 Cal. Rptr. 866.

[50] Halaco Engineering Co. v. South Central Coast Regional Com. (1986) 42 Cal. 3d 52, 75–76, 227 Cal. Rptr. 667, 720 P.2d 15; Monterey Sand Co. v. California Coastal Com. (1987) 191 Cal. App. 3d 169, 178, 236 Cal. Rptr. 315.

[51] Avco Community Developers, Inc. v. South Coast Regional Com. (1976) 17 Cal. 3d 785, 791, 132 Cal. Rptr. 386, 553 P.2d 546, *cert. denied*, 429 U.S. 1083, 97 S. Ct. 1089, 51 L. Ed. 2d 529 (1977); *see* § 60.82[2][b], *above*.

[52] Gov. Code § 65000 et seq.

[53] Gov. Code § 65865. For discussion of development agreements, see Ch. 74, *Development*

includes provisions for approval of "vesting tentative maps" to provide limited vested rights to both commercial and residential development.[55]

In addition, a local jurisdiction may create its own vesting rights provisions by ordinance and its own vesting applications pursuant to its police powers. Local ordinances may confer vested rights earlier than available under the judicial doctrine of vested rights.[56] For example, at least one charter city has created a vesting mechanism similar to the vesting tentative map application for "vesting zone changes"[57] and "vesting conditional use permits."[58] Many cities include language in their zoning ordinance which provides "vesting" of a building project upon issuance of permits, or an earlier date such as acceptance of a complete application for building permit.[59] A city's vesting permit regulations will be upheld even against a subsequently enacted emergency permit requirement.[60]

The general doctrine behind all these vesting applications is that, if the applicant provides enough detail at the time of application regarding the scope, size, and nature of the development, the government agency will grant vested rights to proceed with the development without risk of changing regulations.

PRACTICE TIP: Plan on Proving Estoppel and Vested Rights. The time to prepare a record showing the factors supporting a claim of estoppel or vested rights is not the evening before a local government takes action that will halt your project. Below is a list of strategies that should be employed to preserve a claim of estoppel or vested rights:

- Document all actions taken and statements made by local government officials regarding the project;
- Document the project's reliance on a permit or on assurances from local government, including the costs or liabilities incurred as a result of reliance;
- Seek written concurrence from the local government that the work performed is substantial;
- Keep careful records of all expenditures and activities performed pursuant to the permit;

Agreements and Other Negotiated Land Use Agreements.

[54] Gov. Code § 66410 et seq.

[55] Gov. Code §§ 66498.1–66498.9; *see* Ch. 61, *Subdivision Regulation*.

[56] Davidson v. County of San Diego (1996) 49 Cal. App. 4th 639, 647, 56 Cal. Rptr. 2d 617.

[57] LAMC § 12.32.Q.

[58] LAMC § 12.24.T.

[59] *See e.g.*, LAMC § 12.26.A.3.

[60] Stewart Enterprises, Inc. v. City of Oakland (2016) 248 Cal. App. 4th 410, 203 Cal. Rptr. 3d 677 (subsequently imposed emergency ordinance requiring a conditional use permit for a crematorium could not be imposed on permit vested pursuant to a city's permit-vesting ordinance).

- Start construction, as some physical work on the site is essential; and
- When possible, always use a statutory development agreement or vesting map to vest your rights.

§ 60.83 Territorial Limits

Local governments have no power to zone outside their territorial boundaries. However, a local government is required to plan for development within any extraterritorial area which "bears relation to its planning."[1] A local government also is authorized to make recommendations on subdivision development in an adjoining city or adjoining unincorporated territory, for a proposed subdivision within the planning area of the local agency.[2] A city may also prezone adjoining unincorporated territory for the purpose of determining the zoning that will apply to the property in the event of subsequent annexation to the city.[3] Such zoning becomes effective immediately on the date of annexation,[4] avoiding the delay that would otherwise follow annexation before zoning could be adopted either through the usual procedures[5] or by urgency interim ordinance.[6] Urgency interim zoning is specifically permitted when territory to be annexed is not prezoned.[7]

For coverage of planning and zoning issues, see Chapter 62, *Planning*.

§ 60.84 Antitrust

[1] Introduction

Because zoning often restricts or interferes with commercial activity, zoning regulations may have the effect of stifling market competition or creating monopoly power. Challenges to zoning ordinances therefore have sometimes relied upon antitrust law[1] to argue that zoning actions illegally restrain trade or create a business monopoly. These challenges have been brought with little success in California and the Ninth Circuit.[2]

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[1] Gov. Code §§ 65300, 65301.

[2] Gov. Code § 66453.

[3] Gov. Code § 65859.

[4] Gov. Code § 65859.

[5] *See* §§ 60.20, 60.21 (adoption and amendment of zoning ordinances).

[6] Gov. Code § 65858.

[7] Gov. Code § 65859(c).

[1] *See* 15 U.S.C. § 1 et seq. (Sherman Antitrust Act of 1890); Bus. & Prof. Code § 16700 et seq. (Cartwright Act—California's Antitrust Act). The Cartwright Act is patterned after the federal Sherman Antitrust Act, and courts have looked to the Sherman Act to construe the Cartwright Act. Blank v. Kirwan (1985) 39 Cal. 3d 311, 319–320, 216 Cal. Rptr. 718, 703 P.2d 58.

[2] *See* Fisher v. City of Berkeley (1984) 37 Cal. 3d 644, 675, 209 Cal. Rptr. 682, 693 P.2d 261 (rejecting antitrust challenge to city rent control ordinance, where city had proper local purpose and where ordinance was rationally related to municipality's legitimate exercise of its police power and operated in an even handed manner), *aff'd on other grounds*, 475 U.S. 260, 106 S. Ct. 1045, 89 L. Ed. 2d 206 (1986) (rejecting

Section 1 of the Sherman Antitrust Act prohibits any person from conspiring to restrain trade or commerce.[3] Section 2 prohibits any person from monopolizing or attempting to monopolize interstate trade or commerce.[4] An antitrust challenge to a local zoning regulation must establish both of the following:[5]

- The regulation is facially invalid under either Section 1 or Section 2 of the Sherman Act;[6] and
- The regulatory action is not immune from antitrust law under the state action exemption.[7]

[2] Facial Validity

A local government's regulatory action will not violate either Section 1 or 2 of the Sherman Act[8] if it satisfies the "rule of reason" test used by the California Supreme Court in *Fisher v. City of Berkeley* to uphold a rent control ordinance against antitrust challenges.[9] Under *Fisher*, a regulation will be upheld if all of the following are satisfied:[10]

- The regulation has a proper local purpose;
- The regulation is rationally related to the municipality's legitimate exercise of its police power; and
- The regulation operates in an evenhanded manner.

However, the regulation will not be upheld if the plaintiff can show that the locality's purposes could be achieved as effectively by means that would have a less intrusive effect on federal antitrust policies.[11] The *Fisher* Court applied a test similar to the test applied to challenges under the Commerce Clause, and it rejected an approach that

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federal antitrust allegations against city rent control ordinance where city did not act in concert with another as required by antitrust law for liability to attach); Traweek v. City and County of San Francisco (9th Cir. 1990) 920 F.2d 589, 593 (anticompetitive results of local zoning decisions are logical and foreseeable result of California's general grant of zoning power to municipalities qualifying municipalities for immunity from antitrust liability despite city's malicious exercise of zoning power); Litton International Dev. Corp. v. Simi Valley (C.D. Cal. 1985) 616 F. Supp. 275, 295 (no evidence of concerted action between defendant city and co-defendant hotel operators in denying petitioner's application for a hotel permit and amending the general plan to allow only residential development on petitioner's property).

[3] 15 U.S.C. § 1.

[4] 15 U.S.C. § 2.

[5] Fisher v. City of Berkeley (1986) 475 U.S. 260, 265, 270, 106 S. Ct. 1045, 89 L. Ed. 2d 206.

[6] *See* § 60.84[2], *below*.

[7] *See* § 60.84[3], *below*.

[8] 15 U.S.C. §§ 1, 2.

[9] Fisher v. City of Berkeley (1984) 37 Cal. 3d 644, 675, 209 Cal. Rptr. 682, 693 P.2d 261, *aff'd on other grounds*, 475 U.S. 260, 106 S. Ct. 1045, 89 L. Ed. 2d 206 (1986).

[10] Fisher v. City of Berkeley (1984) 37 Cal. 3d 644, 675, 209 Cal. Rptr. 682, 693 P.2d 261, *aff'd on other grounds*, 475 U.S. 260, 106 S. Ct. 1045, 89 L. Ed. 2d 206 (1986).

[11] Fisher v. City of Berkeley (1984) 37 Cal. 3d 644, 675, 209 Cal. Rptr. 682, 693 P.2d 261, *aff'd on other grounds*, 475 U.S. 260, 106 S. Ct. 1045, 89 L. Ed. 2d 206 (1986).

would require balancing the health, safety, or welfare rationale for the local regulation against the economic efficiency goals of federal antitrust policy.[12]

By contrast, the United States Supreme Court in *Fisher* applied a more traditional antitrust analysis in upholding Berkeley's rent control ordinance against antitrust attack. The Court found the Berkeley ordinance facially valid because it did not involve concerted anticompetitive action between separate entities.[13]

[3] State Action Immunity

A state itself, whether acting through its legislative, judicial, or executive departments, is not subject to the antitrust laws.[14] However, when a state delegates authority to a subordinate entity, such as a local government, that then acts anticompetitively, the subordinate is not automatically beyond the reach of the antitrust laws.[15] State immunity from antitrust liability will only protect a subordinate entity when the subordinate acts in accordance with a clearly articulated state policy to displace competition with regulation.[16] Immunity does not require specific, detailed legislative authorization for the local action, as long as the local action is a foreseeable or logical consequence of the state's grant of authority.[17] However, a general grant of legislative authority by the state to local governments under a "home rule" provision (such as Cal. Const. art. XI, §§ 3, 5, and 7) is insufficient to confer immunity.[18]

The Ninth Circuit has ruled that the anticompetitive results of local zoning decisions are a logical and foreseeable result of California's Planning and Zoning Law,[19] which grants broad zoning power to municipalities and thus qualifies municipal zoning acts for immunity from antitrust liability.[20] Similar zoning enabling acts in other states have been found sufficient to confer local immunity.[21] Thus, most zoning actions will be

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[12] Fisher v. City of Berkeley (1984) 37 Cal. 3d 644, 675, 209 Cal. Rptr. 682, 693 P.2d 261, *aff'd on other grounds*, 475 U.S. 260, 106 S. Ct. 1045, 89 L. Ed. 2d 206 (1986).

[13] Fisher v. City of Berkeley (1986) 475 U.S. 260, 264, 106 S. Ct. 1045, 89 L. Ed. 2d 206.

[14] Lancaster Community Hospital v. Antelope Valley Hospital District (9th Cir. 1991) 940 F.2d 397, 399–400 (citing Parker v. Brown (1943) 317 U.S. 341, 350–352, 63 S. Ct. 307, 87 L. Ed. 315).

[15] Community Communications Co. v. City of Boulder (1982) 455 U.S. 40, 52, 102 S. Ct. 835, 70 L. Ed. 2d 810; Lancaster Community Hospital v. Antelope Valley Hospital District (9th Cir. 1991) 940 F.2d 397, 399–400.

[16] Town of Hallie v. Eau Claire (1985) 471 U.S. 34, 42, 105 S. Ct. 1713, 85 L. Ed. 2d 24.

[17] City of Columbia v. Omni Outdoor Advertising (1991) 499 U.S. 365, 372–373, 111 S. Ct. 1344, 113 L. Ed. 2d 382; Town of Hallie v. Eau Claire (1985) 471 U.S. 34, 42–44, 105 S. Ct. 1713, 85 L. Ed. 2d 24.

[18] Town of Hallie v. Eau Claire (1985) 471 U.S. 34, 43, 105 S. Ct. 1713, 85 L. Ed. 2d 24; Community Communications Co. v. City of Boulder (1982) 455 U.S. 40, 56, 102 S. Ct. 835, 70 L. Ed. 2d 810.

[19] Gov. Code § 65000 et seq.

[20] Traweek v. City and County of San Francisco (9th Cir. 1990) 920 F.2d 589, 591–593 (upholding regulation prohibiting condominium conversions); *see, e.g.,* Gov. Code §§ 65302(a), 65800, 65850, 65864–65969.5.

[21] *See, e.g.,* Scott v. Sioux City, Iowa (8th Cir. 1984) 736 F.2d 1207, 1210–1214, *cert. denied*, 471 U.S. 1003, 105 S. Ct. 1864, 85 L. Ed. 2d 158 (1985); Racetrac Petroleum, Inc. v. Prince George's County (D. Md. 1985) 601 F. Supp. 892, 904–908, *aff'd*, 786 F.2d 202 (4th Cir. 1986).

immune from antitrust liability despite any anticompetitive result and despite the local government's malicious exercise of zoning power.[22] However, a local zoning action that contravenes an express and overriding state policy would not be immune from antitrust attack.[23]

[4] Unilateral Action

Because Section 1 of the Sherman Act prohibits only concerted action between separate entities to restrain trade, the unilateral regulatory acts of a local government are not subject to challenge on restraint of trade grounds.[24] Thus, a local government acting unilaterally is immune from antitrust liability because unilateral action is outside the scope of antitrust law.

Concerted action typically involves an agreement between the local government and a private entity to regulate in a manner restraining trade, such as an agreement between a city and a commercial developer to zone out competing developments.[25] The U.S. Supreme Court has expressly rejected the contention that the connection between a city, its officials, and the public constitutes concerted activity for antitrust purposes.[26] The Supreme Court has also rejected the theory that a "conspiracy exception" to immunity from a Sherman Act challenge exists when an apparently unilateral zoning action allegedly results from an agreement or understanding between the locality and a private party.[27] However, a governmental regulation, such as a rent control ordinance, that delegates a degree of regulatory power to private parties is not unilateral and may be subject to antitrust attack.[28]

The role of individuals attempting to influence government action can raise questions of whether the local government is acting in concert with another entity to restrain trade.[29] In such instances, the so-called *Noerr-Pennington* doctrine of immunity states that efforts by individuals to influence government action are constitutionally protected petition activities and, thus, not within the scope of antitrust law.[30]

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[22] Traweek v. City and County of San Francisco (9th Cir. 1990) 920 F.2d 589, 593.

[23] *See, e.g.,* Kern-Tulare Water Dist. v. City of Bakersfield (E.D. Cal. 1986) 634 F. Supp. 656, 662–663, *aff'd in part and rev'd in part*, 828 F.2d 514 (9th Cir. 1987), *cert. denied*, 486 U.S. 1015, 108 S. Ct. 1752, 100 L. Ed. 2d 214 (1988) (water purchase agreement violated state water policy to avoid waste of water resources).

[24] Fisher v. City of Berkeley (1986) 475 U.S. 260, 266–270, 106 S. Ct. 1045, 89 L. Ed. 2d 206.

[25] *See, e.g.,* Westborough Mall v. Cape Girardeau, Mo. (8th Cir. 1982) 693 F.2d 733, 737–740, *cert. denied*, 461 U.S. 945, 103 S. Ct. 2122, 77 L. Ed. 2d 1303 (1983).

[26] Fisher v. City of Berkeley (1986) 475 U.S. 260, 267, 106 S. Ct. 1045, 89 L. Ed. 2d 206.

[27] City of Columbia v. Omni Outdoor Advertising (1991) 499 U.S. 365, 374, 111 S. Ct. 1344, 113 L. Ed. 2d 382.

[28] Fisher v. City of Berkeley (1986) 475 U.S. 260, 268, 106 S. Ct. 1045, 89 L. Ed. 2d 206.

[29] *See, e.g.,* Blank v. Kirwan (1985) 39 Cal. 3d 311, 319, 216 Cal. Rptr. 718, 703 P.2d 58 (rejecting allegation that private efforts to influence city to legalize operation of poker clubs and deny plaintiff's application for poker club permit violated antitrust law).

[30] Mine Workers v. Pennington (1965) 381 U.S. 657, 669–672, 85 S. Ct. 1585, 14 L. Ed. 2d 626;

§§ 60.85–60.89 [Reserved]

8. Zoning Issues of Statewide and Regional Concern

§ 60.90 Housing

[1] Introduction

In California, there is a statewide interest in the availability and quality of housing, and a great deal of legislation on housing impacts local zoning regulation. The state has recognized an increasing shortage of housing supply at all levels of affordability, from above moderate to lower income.[1]

[2] State Policy to Encourage Affordable Housing

To address the severe shortage of affordable housing, the state has enacted various laws that provide incentives or requirements favoring affordable housing development.[2] However, cities and counties have the authority to regulate land use, including affordable housing, under their police powers. A tension occasionally arises between the state policy favoring the development of affordable housing and some local governments' regulations which have the effect of discouraging affordable housing. Consequently, various state laws inhibit local governments from using their powers to plan, zone, and regulate development in ways that exclude the development of lower and moderate income housing.[3] Through these various laws, the state has declared that the availability of housing, including affordable housing, is of vital statewide importance.[4] Thus, the state laws regulating housing development, including affordable housing, apply to both charter cities as well as general law cities despite any conflicting local regulations.

Eastern R. R. Conference v. Noerr Motor Freight (1961) 365 U.S. 127, 135–144, 81 S. Ct. 523, 5 L. Ed. 2d 464.

[1] *See* Gov. Code § 65913(a).

[2] *See* Health & Safety Code §§ 33136, 33334.2, 33334.9 (requiring redevelopment agencies to set aside 20 percent of tax increment revenues to fund development of low and moderate income housing); *see also* Gov. Code § 65915 (requiring density bonuses, incentives, and/or concessions for developers who agree to include lower income or very low income housing, senior citizen housing, moderate income housing in common interest developments, transitional foster youth, disabled veterans, homeless, or child care facilities in housing developments), § 65590 (requiring replacement of or creation of low and moderate income housing within coastal zone, commonly known as Mello Act), § 65852.2 (encouraging development of accessory dwelling units).

[3] *See* Gov. Code § 65580 *et seq.* (requiring cities and counties to plan for affordable housing in their Housing Elements); *see also* Gov. Code § 65008(b)(2) (prohibiting cities and counties from discriminating against residential developments for very low, low, and moderate income housing); *see also* Gov. Code §§ 65589.5(d) (prohibiting local governments from conditioning residential project for housing for very low, low-, or moderate-income households, or emergency shelters, in such a way as to render project infeasible), 65580 et seq. (requiring that each local government include housing element in its general plan and share in regional housing needs, including housing needs of low and moderate income households). For a discussion of general plans, see Ch. 62, *Planning*.

[4] *See* Gov. Code §§ 65580(a), 65589.5(g), 65589.7(f), 65913.9; *see also* Sec. 2(b) of the Housing Crisis Act of 2019 (SB 330), which declares a statewide housing emergency to be in effect until January 1, 2025.

[3] Obstruction of Affordable Housing

[a] Article XXXIV Elections

The California state constitution requires that no low rent housing project shall be developed, constructed, or acquired by a federal, state, or local government until a majority of the voters in the jurisdiction approve the project in a special or general election.[5] The article defines a "low rent housing project" and "persons of low income." A low rent housing project is a project of apartments or living accommodations for persons of low income, financed in whole or in part by public monies, or a project into which the federal, state, or local government extends assistance by supplying all or part of the labor to construct the project.[6] Persons of low income are persons or families who lack the amount of income necessary to enable them to live in decent, safe, sanitary dwellings without financial assistance, as determined by the government developing the project.[7] Thus, the voter approval requirements of Article XXXIV only arise for publicly funded or publicly built rental housing for persons who could not otherwise live in safe, sanitary conditions. Privately developed affordable housing projects, for-sale affordable projects, and projects for persons of low income under the statutory definition are not subject to Article XXXIV voter approval.

Article XXXIV does not, by its express terms, require that specific information about the proposed project be provided to the electorate in the ballot measure seeking voter approval, and voter approval is not required for every discrete project subject to Article XXXIV. For example, a local government may satisfy the requirements of Article XXXIV by obtaining voter approval of the maximum number of low rent housing units to be developed, even if the locations and target dates of specific projects have not been determined or disclosed.[8]

[b] Growth Controls

Cities and counties typically implement local growth control measures and programs through their general plan, specific plans, and zoning ordinances. However, growth control measures also may be enacted by voter initiative. Growth control approaches that may inhibit affordable housing, whether enacted by local governments or voters, include annual limits, infrastructure/resource-based limits, urban growth boundaries, and voter approval requirements. Growth control measures may not violate statutory requirements for zoning vacant land for residential uses, including affordable units.[9] With certain exceptions, when such a growth control measure is challenged, the local government has the burden of proving that the measure is necessary to protect the

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[5] Cal. Const. art. XXXIV.

[6] Cal. Const. art. XXXIV, § 1.

[7] Cal. Const. art. XXXIV, § 1. This definition of low income is much narrower than the statutory mathematical formula used for most affordable housing statutes, which define very low and low income on the basis of a percentage of the median income in the community. See Health & Safety Code §§ 50079.5 (low income), 50105 (very low income).

[8] Davis v. City of Berkeley (1990) 51 Cal. 3d 227, 244, 272 Cal. Rptr. 139, 794 P.2d 897.

[9] Gov. Code § 65913.1.

public health, safety, and welfare.[10] This burden of proof is applicable to a growth control measure enacted by voter initiative.[11] In addition, when a growth control measure is enacted by a local government, the local government must make findings justifying the reduction in the regional housing supply.[12] This findings requirement does not apply to voter initiatives.[13]

In an effort to address California's severe housing shortage, the Legislature enacted the Housing Crisis Act of 2019, which contains restrictions on local growth control measures.[14] Until the Act sunsets in 2025, it prohibits urban jurisdictions[15] from enacting development policies, standards, or conditions that would, "lessen the intensity of housing." The Housing Crisis Act also bans jurisdictions from placing moratoriums or similar restrictions on housing development and limiting or capping the number of housing units that will be permitted in the jurisdiction, unless the jurisdiction is predominately agricultural.

[c] Discrimination

A local government may not prohibit or discriminate against a housing project on the basis of its method of financing or because the intended occupants are very low, low, or middle income households.[16] Furthermore, a local government may not impose different requirements on subsidized housing than on nonsubsidized housing.[17] However, a local government may give preferential treatment to subsidized projects.[18]

[4] Facilitation of Affordable Housing

[a] Zoning in Consideration of Regional Affordable Housing Needs

A local government must zone sufficient vacant land for residential use. The density, setback, minimum floor area, lot coverage, and parking standards must appropriately contribute to the economic feasibility of producing housing at the lowest cost possible

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[10] Evid. Code § 669.5.

[11] Building Industry Assn. v. City of Camarillo (1986) 41 Cal. 3d 810, 821, 226 Cal. Rptr. 81, 718 P.2d 68.

[12] Gov. Code § 65863.6.

[13] Building Industry Assn. v. City of Camarillo (1986) 41 Cal. 3d 810, 823–824, 226 Cal. Rptr. 81, 718 P.2d 68.

[14] Gov. Code § 66300 *et seq* (becomes inoperative January 1, 2025).

[15] The Housing Crisis Act restricts "affected cities" and "affected counties" as defined in Gov. Code § 66300(a)(1)–(3).

[16] Gov. Code § 65008(b), (c); *see* Building Indus. Assn. v. City of Oceanside (1994) 27 Cal. App. 4th 744, 761–771, 33 Cal. Rptr. 2d 137 (invalidating city's growth control initiative in part because initiative discriminated against low income housing projects).

[17] Gov. Code § 65008(d); *see* Bruce v. City of Alameda (1985) 166 Cal. App. 3d 18, 21, 212 Cal. Rptr. 304 (invalidating initiative requiring voter approval of subsidized housing because nonsubsidized housing is not subject to voter approval).

[18] Gov. Code § 65008(e).

given the environmental health and safety factors in the region.[19] A local government must also consider regional housing needs when establishing residential zones, and must balance regional needs against local public service, fiscal, and environmental resources.[20]

A local government's housing element must identify adequate sites for housing for the existing and projected needs of all economic segments of the community as determined by the California Department of Housing and Community Development.[21] This projected need is called a Regional Housing Needs Allocation (RHNA). When a local government cannot identify adequate sites to accommodate its RHNA for groups of all household income levels, it must rezone to accommodate projected need. The rezoning, including adoption of minimum density and development standards, must be completed no later than three years after either the date the housing element is adopted or 90 days after receipt of comments from the California Department of Housing and Community Development, whichever is earlier, unless the deadline is extended.[22]

A local government must also identify in its housing element those zones in which emergency shelters are permitted without a conditional use or other discretionary permit, and those zones must include sufficient capacity to accommodate the need for emergency shelters.[23] When a local government cannot identify a zone or zones with sufficient capacity for establishing emergency shelters, it must include a program to amend its zoning ordinance to meet these requirements within one year of the adoption of the housing element.[24]

In exercising their subdivision authority,[25] local governments cannot impose design criteria for the purpose of rendering infeasible the development of housing for all economic segments of the community.[26] A local government does not violate state zoning law when considering environmental, fire protection, and public facility availability in establishing height limitations and parking restrictions for multi-family housing in a growth management program.[27]

For detailed coverage of regional planning, see Chapter 62, *Planning*.

[b] Findings Required by The Housing Accountability Act

Under the Housing Accountability Act,[28] a local agency must make specific written findings before rejecting or lowering the proposed density of a housing development

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[19] Gov. Code § 65913.1(a).

[20] Gov. Code § 65863.5.

[21] Gov. Code § 65583(a)(3); *see* Gov. Code §§ 65584, 65584.01 (calculation of regional housing needs).

[22] Gov. Code § 65583(c)(1)(a).

[23] Gov. Code § 65583(a)(4)(A).

[24] Gov. Code § 65583(a)(4)(A).

[25] Gov. Code § 66410 et seq.

[26] Gov. Code § 65913.2.

[27] Hernandez v. City of Encinitas (1994) 28 Cal. App. 4th 1048, 1072–1076, 33 Cal. Rptr. 2d 875.

[28] Gov. Code § 65589.5.

project that provides very low, low-, and moderate-income housing, or that complies with applicable, objective[29] general plan, zoning, and subdivision standards and criteria.[30] A local agency may not disapprove[31] a project that is affordable to very low, low-, or moderate-income households, or is an emergency shelter, or condition such an approval in a manner that renders the project infeasible for development,[32] unless the agency makes one of the following findings, based on a preponderance of the evidence in the record:[33]

- The local agency has met or exceeded its share of the regional housing need allocation[34] for the planning period and income category proposed for the housing development project;[35]
- The housing development project or emergency shelter would have specific adverse impacts on public health and safety, and no method exists to feasibly mitigate these impacts;[36]
- Denying or imposing conditions is necessary to comply with specific state or federal law, and there is no feasible method to comply without rendering the housing development project unaffordable to low and moderate-income households or rendering the housing development project or the emergency shelter financially infeasible;
- The housing development project or emergency shelter is proposed to be built on, or adjacent to, agricultural or resource preservation lands, or lands not having adequate water or wastewater facilities to serve the project; or
- The housing development project or emergency shelter is inconsistent with both the locality's zoning ordinance and general plan land use designation as specified in any element of the general plan as it existed on the date the application was deemed complete,[37] and the locality has adopted a revised housing element[38] that is in substantial compliance with Article 10.6 governing housing elements. A change to the zoning ordinance or general plan land use designation subsequent to the date the application was deemed complete will

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[29] *See* Gov. Code § 65589.5(h)(8) ("objective" defined, expires January 1, 2025).

[30] Gov. Code § 65589.5(d), § 65589.5(j); *see* Gov. Code § 65589.5(h)(2) ("housing development project" defined); *see* Honchariw v. County of Stanislaus (2011) 200 Cal. App. 4th 1066, 1074, 132 Cal. Rptr. 3d 874 ("housing development projects" are not limited to projects involving affordable housing).

[31] *See* Gov. Code § 65589.5(h)(6) ("disapprove the housing development project" defined).

[32] Gov. Code § 65589.5(b), (h)(1) ("feasible" defined).

[33] Gov. Code § 65589.5(d).

[34] Gov. Code § 65584; *see* § 62.03[3][d][iii].

[35] Gov. Code § 65589.5(d)(1).

[36] Inconsistency with the zoning ordinance or general plan land use designation does not constitute a specific, adverse impact on the public health or safety, nor does the eligibility to claim a welfare exemption under Rev. & Tax. Code 214(g). Gov. Code § 65589.5(d)(2).

[37] *See* Gov. Code § 65589.5(h)(5) ("deemed complete" defined, expires January 1, 2025).

[38] *See* Gov. Code § 65588 (housing element revisions).

not constitute a valid basis to disapprove or condition approval of the housing development project or emergency shelter.[39]

If a housing development proposal complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards,[40] in effect at the time that the application is deemed complete, it may be rejected or approved at a lower density[41] than proposed only on the basis of written findings supported by a preponderance of the evidence that the proposed development would have a specific adverse impact on public health and safety, and that there is no feasible way to mitigate this impact other than rejection or approval at a lower density.[42] If the local agency considers a proposed housing development project to be not in compliance with an applicable provision, it must provide the applicant, within specified timeframes, with written documentation identifying the provision or provisions and an explanation of the reason or reasons it considers the housing development project to be not in compliance.[43] The local agency's failure to provide the required documentation means that the housing development project will be deemed compliant with the applicable provisions.[44]

The penalty for a local agency's violation of the Housing Accountability Act can be steep. The local agency bears the burden of proof in a legal action challenging the agency's disapproval or conditional approval of a housing development project.[45] If the court finds a local agency violated the Housing Accountability Act, it will impose a minimum fine of $10,000 per unit, which could be multiplied by a factor of 5 if the local agency acted in bad faith.[46]

[c] Density Bonus Law

[i] Density Bonus (Unit Increase) and Adjusted Parking Ratios

The Density Bonus Law[47] applies to housing developments consisting of five or more residential units, including mixed-use developments.[48] A density bonus is an increase in the maximum allowable residential density under the applicable zoning. The amount of the bonus varies based on the level of affordable housing provided by a

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[39] Gov. Code § 65589.5(d)(5).

[40] When objective zoning and general plan provisions are inconsistent, a housing development project need only comply with the objective general plan provisions, except it must also comply with objective zoning provisions to the extent they are consistent with objective plan provisions. Gov. Code § 65589.5(j)(4).

[41] See Gov. Code § 65589.5(h)(7) ("lower density" defined).

[42] Gov. Code § 65589.5(j).

[43] Gov. Code § 65589.5(j)(2).

[44] Gov. Code § 65589.5(j)(2)(B).

[45] Gov. Code § 65589.6.

[46] Gov. Code § 65589.5(k), (l).

[47] Gov. Code § 65915 et seq.

[48] Gov. Code § 65915(i).

project.[49] A local government must grant one density bonus[50] and other concessions or incentives[51] to residential developers who propose any one of the following:[52]

- At least 10 percent of the total units[53] of a housing development for lower income households;[54]
- At least 5 percent of the total units of a housing development for very low income households;[55]
- A senior citizen housing development or mobilehome park;[56]
- At least 10 percent of the total dwelling units in a common interest development for persons and families of moderate income;[57]
- Ten percent of the total units of a housing development for transitional foster youth, disabled veterans, or homeless persons, as defined in the federal McKinney-Vento Homeless Assistance Act;[58]
- Twenty percent of the total units for lower income students in a student housing development that meets specified requirements;[59]
- One hundred percent of all units, exclusive of a manager's unit or units, are for lower income households, except that up to 20 percent of the total units in the development may be for moderate-income households;[60]

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[49] Gov. Code § 65915(f).

[50] *See* Gov. Code § 65915(f) (calculation of a density bonus).

[51] *See* Gov. Code § 65915(d) (calculation of concessions or incentives) and Gov. Code § 65915(k) ("concession or incentive" defined). Concessions and incentives are discussed in greater detail in § 60.90[4][c][iii], *below*.

[52] Gov. Code § 65915(b). See Gov. Code § 65915(c)(1)–(2) for additional requirements regarding affordability of qualifying units.

[53] "Total units" does not include the units awarded as part of the density bonus. Gov. Code § 65915(b)(3).

[54] Gov. Code § 65915(b)(1)(A); *see* Health & Safety Code § 50079.5 ("lower income households" defined).

[55] Gov. Code § 65915(b)(1)(B); *see* Health & Safety Code § 50105 ("very low income households" defined).

[56] Gov. Code § 65915(b)(1)(C); *see* Civ. Code §§ 51.3 and 51.12 ("senior citizen housing development" defined); *see* Civ. Code §§ 798.76 or 799.5 (mobilehome park requirements).

[57] Gov. Code § 65915(b)(1)(D); *see* Civ. Code § 4100 ("common interest development" defined); *see* Health & Safety Code § 50093 ("moderate income" defined).

[58] Gov. Code § 65915(b)(1)(E); *see* Educ. Code § 66025.9 ("transitional youth" defined); *see* Gov. Code § 18541 ("disabled veterans" defined); see 42 U.S.C. § 11301 et seq ("homeless persons" defined). The units described in this subparagraph are subject to a recorded affordability restriction of 55 years and must be provided at the same affordability level as very low income units. Gov. Code § 65915(b)(1)(E).

[59] Gov. Code § 65915(b)(1)(F). For purposes of calculating this density bonus, the term "unit" means one rental bed and its pro rata share of associated common area facilities. Such units are subject to a recorded affordability restriction of 55 years. Gov. Code § 65915(b)(1)(F).

[60] Gov. Code § 65915(b)(1)(G); see Health & Safety Code § 50079.5 ("lower income households"

- Thirty-three percent of the total units to persons and families of low or moderate income or 15 percent to lower income households in condominium conversion projects;[61] or
- A donation of land to a city, county, or city and county that meets specified conditions relating to size and location, deed restrictions, and transfer for a tentative subdivision map, parcel map, or other residential development approval.[62]

When a childcare facility is proposed as part of the housing development, an additional density bonus, or a concession or incentive, must be granted.[63]

A local government cannot require a higher percentage of affordable housing units to achieve the density bonuses authorized by the Density Bonus Law.[64] However, if permitted by local ordinance, a local government is not prohibited from granting a density bonus greater than described in the Density Bonus Law for a housing development that meets the requirements for a bonus. The local government may also grant a proportionately lower density bonus than what is required by the Density Bonus Law for housing developments that do not meet the requirements.[65] Thus, a city properly granted a density bonus of over 40 percent to the developer of a project that included senior housing.[66]

The Density Bonus Law contains extensive replacement requirements when a housing development is proposed on any property that includes a parcel or parcels on which rental dwelling units are (1) subject to a recorded covenant, ordinance, or law that restricts rents to levels affordable to persons and families of lower or very low income, or, if such dwelling units have been vacated or demolished in the five-year period preceding the application; (2) subject to any other form of rent or price control through a public entity's valid exercise of its police power; or (3) occupied by lower or very low income households.[67]

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defined); *see* Health & Safety Code § 50053 ("moderate income households" defined). All units, including units awarded as part of density bonus, must be for lower income households, except as provided above. Gov. Code § 65915(b)(1)(G).

[61] See Gov. Code § 65915.5 for special requirements and limitations applicable to density bonuses for condominium conversions.

[62] Gov. Code § 65915(g); *see* Gov. Code § 65915(g)(2) (conditions).

[63] Gov. Code § 65915(h); *see* Gov. Code § 65915(h)(4) ("childcare facility" defined).

[64] Latinos Unidos Del Valle De Napa Y Solano v. County of Napa (2013) 217 Cal. App. 4th 1160, 1169, 159 Cal. Rptr. 3d 284 (a county ordinance that excluded affordable units provided pursuant to its inclusionary housing from the calculation of density bonus was void).

[65] Gov. Code § 65915(n).

[66] Friends of Lagoon Valley v. City of Vacaville (2007) 154 Cal. App. 4th 807, 825–826, 65 Cal. Rptr. 3d 251 (city was not precluded from awarding developers a density bonus of 40.5% upon approval of development proposal that included plans for low-income, moderate-income, and senior housing, regardless of whether city had passed an ordinance authorizing such award); *see also* Wollmer v. City of Berkeley (2009) 179 Cal. App. 4th 933, 943–944, 102 Cal. Rptr. 3d 19.

[67] *See* Gov. Code § 65915(c)(3).

At the developer's request for a housing development that qualifies for a density bonus, the local government may not require a vehicular parking ratio, inclusive of handicapped and guest parking, that exceeds the following ratios:[68]

- Zero to one bedroom: one onsite parking space.
- Two to three bedrooms: one and one-half onsite parking spaces.
- Four and more bedrooms: two and one-half parking spaces.

However, if a housing development includes at least 20 percent low-income units or at least 11 percent very low income units, is located within one-half mile of a major transit stop,[69] and has unobstructed access to the major transit stop from the development, then, on the request of the developer, a city, county, or city and county may not impose a vehicular parking ratio, inclusive of handicapped and guest parking, that exceeds 0.5 spaces per bedroom.[70]

Further, if a housing development consists solely of lower-income units, exclusive of a manager's unit or units, on the request of the developer, a city, county, or city and county may not impose any vehicular parking standards when the housing development meets either of the following criteria:[71]

- It is located within one-half mile of a major transit stop and there is unobstructed access to the major transit stop from the development;
- It is a for-rent housing development for individuals who are 62 years of age or older, complies with Civ. Code §§ 51.2 and 51.3, and has either paratransit service or unobstructed access, within one-half mile, to fixed bus route service that operates at least eight times per day;
- It is a special needs housing development[72] and has either paratransit service or unobstructed access, within one-half mile, to fixed bus route service that operates at least eight times per day; or
- It is a supportive housing development.[73]

If a city, county, city and county, or an independent consultant has conducted an areawide or jurisdiction-wide parking study in the last seven years that supports the need for higher parking ratios, then the imposition of such higher vehicular parking

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[68] Gov. Code § 65915(p)(1). An applicant may request additional parking incentives or concessions beyond those provided in this subsection, pursuant to Gov. Code § 95915(d). Gov. Code § 65915(p)(3).

[69] *See* Pub. Res. Code § 21155(b) ("major transit stop" defined).

[70] Gov. Code § 65915(p)(2)(A). For these purposes, a development has unobstructed access to a major transit stop if a resident is able to access the major transit stop without encountering natural or constructed impediments, including freeways, rivers, mountains, and bodies of water, but not including residential structures, shopping centers, parking lots, or rails used for transit. Gov. Code § 65915(p)(2)(B).

[71] Gov. Code § 65915(p)(3)–(4).

[72] *See* Health & Safety Code § 51312 ("special needs housing development" defined).

[73] *See* Health and Safety Code § 50675.14 ("supportive housing development" defined).

ratios is permitted, so long as they do not to exceed the ratios described in Gov. Code § 65915(p)(1).[74]

Finally, a city, county, or city and county is not precluded from reducing or eliminating a parking requirement for development projects of any type in any location;[75] and a request for parking reduction neither reduces nor increases the number of incentives or concessions to which the applicant is entitled pursuant to the Density Bonus Law.[76]

[ii] Density Bonus (Floor Area Increase) and Adjusted Parking Ratios

The Density Bonus Law also permits a city, county, or city and county to establish a procedure by ordinance to grant a developer of an eligible housing development, on the request of the developer, a floor area ratio bonus in lieu of a density bonus awarded on the basis of dwelling units per acre.[77] An eligible housing development must satisfy all the following criteria to qualify for a floor area ratio bonus:[78]

- The development proposes five or more multifamily residential units, exclusive of any other floor area ratio bonus, incentive, or concession awarded pursuant to the Density Bonus Law;
- The development is located within either an urban infill site that is within a transit priority area or one-half mile of a major transit stop;[79]
- The site is zoned to allow residential use or mixed-use with a minimum planned density of at least 20 dwelling units per acre and does not include any land zoned for low density residential use or for exclusive nonresidential use;
- The applicant and the development satisfy the replacement requirements applicable to housing development projects receiving a density bonus awarded on the basis of dwelling units per acre;[80]
- The development proposes at least 20 percent of the units affordable to households with an income equal to or less than 50 percent of the area median income[81] and subject to an affordability restriction for a minimum of 55 years;[82] and

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[74] Gov. Code § 65915(p)(8).

[75] Gov. Code § 65915(p)(7).

[76] Gov. Code § 65915(p)(9).

[77] Gov. Code § 65917.2(b)(1); *see* Gov. Code § 65917.2(a)(2) ("floor area ratio" defined); *see* Gov. Code § 65917.2(a)(3) ("floor area ratio bonus" defined); *see* Gov. Code § 65917.2(b)(2) (calculation of gross residential area in square feet).

[78] Gov. Code § 65917.2(a)(1).

[79] *See* Pub. Res. Code § 21099 ("transit priority area" defined); *see* Pub. Res. Code § 21155 ("major transit stop" defined).

[80] *See* Gov. Code § 65915(c) (replacement requirements).

[81] *See* Health & Safety Code § 50093(c).

[82] The 20 percent requirement excludes any additional units allowed under a floor area ratio bonus or other incentives or concessions. Gov. Code § 65917.2(a)(1)(E).

- The development complies with the height requirements applicable to the underlying zone.[83]

Additionally, the city, county, or city and county may not impose any parking requirement on an eligible housing development in excess of 0.1 parking spaces per unit that is affordable to persons and families with a household income equal to or less than 120 percent of the area median income and 0.5 parking spaces per unit that is offered at market rate.[84]

When an eligible housing development is zoned for mixed-use purposes, any nonresidential floor area ratio requirement under a zoning ordinance or the general plan will continue to apply notwithstanding the award of a floor area ratio bonus.[85]

An applicant for a floor area ratio bonus is also eligible for incentives or concessions available to a housing development project receiving a density bonus awarded on the basis of dwelling units per acre pursuant to Gov. Code § 65915(d).[86]

If a city, county, or city and county adopts an ordinance authorizing the floor area ratio bonus, it is not relieved from complying with the Density Bonus Law.[87]

[iii] Concessions and Incentives

In addition to granting a density bonus (either on the basis of dwelling units per acre or floor area), a local government must grant other concessions or incentives, which may include any of the following:[88]

- A reduction in site development standards[89] or a modification of zoning code requirements or architectural design requirements, including, but not limited to, a reduction in setback and square footage requirements and in the ratio of vehicular parking spaces that results in identifiable and actual cost reductions to provide for affordable housing costs[90] or for rents for the targeted units;[91]
- Approval of mixed-use zoning in conjunction with the housing project if the nonresidential component will reduce the cost of the housing development;[92] or

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[83] Gov. Code § 65917.2(a)(1).

[84] Gov. Code § 65917.2(c).

[85] Gov. Code § 65917.2(e).

[86] Gov. Code § 65917.2(f); concessions and incentives are discussed in greater detail in § 60.90[4][c][iii], *below*.

[87] Gov. Code § 65917.2(h).

[88] Gov. Code § 65915(k).

[89] *See* Gov. Code § 65915(o)(1) ("development standards" defined).

[90] *See* Health & Safety Code § 50052.5 ("affordable housing cost" defined for various levels of affordability).

[91] Gov. Code § 65915(k)(1). However, eligible housing developments that receive a floor area ratio bonus pursuant to Gov. Code § 65917.2 are not able to request an incentive or concession that loosens height restrictions. Gov. Code § 65917.2(a)(1)(F).

[92] Gov. Code § 65915(k)(2); *see* § 60.12[7].

- Other regulatory incentives or concessions proposed by either the developer or the local government that result in identifiable and actual cost reductions to provide for affordable housing costs or for rents for the targeted units.[93]

A developer is entitled to receive the following number of incentives or concessions:[94]

- One incentive or concession for projects that include (1) at least 10 percent of the total units for lower income households, (2) at least 5 percent for very low income households, or (3) at least 10 percent for persons and families of moderate income in a common interest development;
- Two incentives or concessions for projects that include (1) at least 17 percent of the total units for lower income households, (2) at least 10 percent for very low income households, or (3) at least 20 percent for persons and families of moderate income in a common interest development;
- Three incentives or concessions for projects that include (1) at least 24 percent of the total units for lower income households, (2) at least 15 percent for very low income households, or (3) at least 30 percent for persons and families of moderate income in a common interest development; and
- Four incentives or concessions for projects that provide one hundred percent of all units, exclusive of a manager's unit or units, for lower income households, except that up to 20 percent of the total units in the development may be for moderate-income households;[95] and if the project is located within one-half mile of a major transit stop,[96] the applicant must also receive a height increase of up to three additional stories, or 33 feet.

Upon request by the applicant for specific incentives or concessions, the local government must grant the requested concession or incentive unless it makes a written finding, based on substantial evidence, of any of the following: (1) the concession or incentive does not result in identifiable and actual cost reductions to provide affordable housing; (2) the concession or incentive would have a specific adverse impact[97] on public health and safety or the physical environment or on any real property that is listed in the California Register of Historical Resources, and for which there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low-and moderate-income households; or (3) the concession or incentive would be contrary to state or federal law.[98]

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[93] Gov. Code § 65915(k)(3).

[94] Gov. Code § 65915(d)(2).

[95] Pursuant to Gov. Code § 65915(b)(1)(G).

[96] *See* Pub. Res. Code § 21155(b) ("major transit stop" defined).

[97] *See* Gov. Code § 65589.5(d)(2) ("adverse impacts" defined).

[98] Gov. Code § 65915(d)(1).

[iv] Waiver of Development Standards

Housing developments that are entitled to a density bonus on the basis of dwelling units per acre, will also be entitled to waivers under the Density Bonus Law.[99] Specifically, the local government may not apply any development standard that would physically preclude the construction of a housing development at the densities or with the concessions or incentives permitted by The Density Bonus Law.[100] The applicant may submit a proposal for the waiver or reduction of development standards that will have the effect of physically precluding the construction of the development and may request a meeting with local government.[101]

Waivers can be applied to authorize construction of nonresidential components of housing developments that do not comply with development standards.[102] However, a local government is not required to waive or reduce development standards if the waiver or reduction would have a specific, adverse impact[103] on health, safety, or the physical environment, and for which there would be no feasible method to satisfactorily mitigate or avoid the specific adverse impact.[104] Similarly, a local government is not required to waive or reduce development standards that would adversely impact any real property listed on the California Register of Historic Resources. Finally, a local government is not required to grant any waiver or reduction that would be contrary to state or federal law.[105]

A proposal for the waiver or reduction of development standards neither reduces nor increases the number of incentives or concessions to which the applicant is entitled pursuant to the Density Bonus Law.[106]

[v] Processing of Applications

A local government must adopt an ordinance to implement the Density Bonus Law, and failure to do so does not relieve the local government from complying that law.[107] To provide for the expeditious processing of a density bonus application, a local government must do all of the following:[108]

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[99] Eligible housing developments that qualify for a density bonus for floor area increase is not entitled to waivers under Gov. Code § 65915(e).

[100] Gov. Code § 65915(e)(1).

[101] Gov. Code § 65915(e)(1).

[102] Wollmer v. City of Berkeley (2011) 193 Cal. App. 4th 1329, 1346, 122 Cal. Rptr. 3d 78 (waivers granted for a mixed-use development to accommodate an interior courtyard, a community plaza and 15-foot ceilings in the commercial space and nine-foot ceilings in the residential units).

[103] *See* Gov. Code § 65589.5(d)(2).

[104] Gov. Code § 65915(e)(1).

[105] Gov. Code § 65915(e)(1).

[106] Gov. Code § 65915(e)(2).

[107] Gov. Code § 65915(a)(1). Local governments may, but are not required to adopt an ordinance allowing density bonuses for floor area increases. Gov. Code § 65917.2(b)(1).

[108] Gov. Code § 65915(a)(3).

- Adopt procedures and timelines for processing a density bonus application;
- Provide a list of all documents and information required to be submitted with the density bonus application for the application to be deemed complete;
- Notify the applicant for a density bonus whether the application is complete in a manner consistent with Gov. Code § 65943; and
- If the applicant is notified that the document is deemed complete, provide the applicant with a determination as to the amount of the density bonus, the parking ratio for which the applicant is eligible, and whether the applicant has provided adequate information for the local government to make a determination as to incentives, concessions, waivers, or reductions of development standards.[109]

A local government may not condition the submission, review, or approval of an application for a density bonus, incentives, concessions, waivers, or reductions of development standards, or parking ratios under the Density Bonus Law on the preparation of an additional report or study that is not otherwise required by state law.[110] However, local governments may require an applicant to provide reasonable documentation to establish eligibility for a requested density bonus, incentives or concessions, waivers or reductions of development standards, and parking ratios.[111]

The granting of a density bonus, incentives, concessions, waivers, reductions of development standards, or parking ratios does not require, or will not be interpreted in and of itself to require, a general plan amendment, local coastal plan amendment, zoning change, or other discretionary approval.[112] Therefore, the granting of a density bonus, incentives, concessions, waivers or reductions of development standards, or parking ratios under the Density Bonus Law does not preclude the project from qualifying for the Class 32 Categorical Exemption for infill development under the California Environmental Quality Act (CEQA). That exemption requires that a project must be consistent with the "applicable zoning designation and regulations."[113]

An applicant may initiate judicial proceedings if the local government refuses to grant a requested density bonus, incentive, concession, or waiver or reduction of development standards. The local government bears the burden of proof for the denial of a requested concession or incentive.[114] If the court finds that the refusal to grant a

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[109] These determinations must be based on the development project at the time the application is deemed complete. However, the local government must adjust the amount of density bonus and parking ratios based on any changes to the project during the course of development. Gov. Code § 65915(a)(3)(D).

[110] Gov. Code § 65915(a)(2).

[111] Gov. Code § 65915(a)(2).

[112] Gov. Code § 65915(f)(5); Gov. Code § 65915(j)(1); Wollmer v. City of Berkeley (2011) 193 Cal. App. 4th 1329, 1347–1348, 122 Cal. Rptr. 3d 781.

[113] Wollmer v. City of Berkeley (2011) 193 Cal. App. 4th 1329, 1348–1349, 122 Cal. Rptr. 3d 781. 14 Cal. Code Reg. § 15332(a); *see* Ch. 21, *Preliminary Review, Exemptions, and Negative Declarations*, § 21.06[7] (Categorical Exemptions).

[114] Gov. Code § 65915(d)(4).

requested density bonus, incentive, concession, or waiver or reduction of development standards is in violation of the Density Bonus Law, it must award the plaintiff reasonable attorneys' fees and costs of suit.[115]

PRACTICE TIP: Consult Agency Website. The California Department of Housing and Community Development maintains a website with up-to-date information about housing production, building standards, and new and pending legislation. *See* https://www.hcd.ca.gov/policy-research/index.shtml.

[d] Affordable Housing in Coastal Zones (Mello Act)

The Mello Act provides minimum requirements for the preservation of existing and provision of new affordable housing in coastal zones, and does not limit or prohibit local governments from requiring affordable housing in addition to its requirements.[116] Local governments may not authorize the demolition or conversion of existing residential dwelling units occupied by persons and families of low or moderate income[117] in the coastal zone unless the low or moderate income housing is replaced on the same site.[118] However, replacement housing may be located elsewhere in the same jurisdiction within the coastal zone or within three miles of the coastal zone if relocation on the original site or within the coastal zone is not feasible.[119]

Additionally, local governments must, when feasible, require developers of new housing within the coastal zone to provide housing units for persons and families of low or moderate income.[120] When it is not feasible to provide affordable housing in the new housing development, the local government must, if feasible, require the developer to provide affordable housing elsewhere in the jurisdiction, either within the coastal zone or within three miles of the coastal zone.[121] Local governments must also offer density bonuses and other incentives, such as accelerated processing and waivers of fees, to encourage developers to provide affordable housing.[122]

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[115] Gov. Code § 65915(d)(3); Gov. Code § 65915(e)(1).

[116] Gov. Code § 65590(k).

[117] *See* Health & Safety Code § 50093 ("persons and families of low or moderate income" defined).

[118] Gov. Code § 65590(b); Venice Town Council v. City of Los Angeles (1996) 47 Cal. App. 4th 1547, 1552–1553, 55 Cal. Rptr. 2d 465 (local governments have an affirmative duty to determine whether low or moderate income housing is being destroyed and to require the replacement of affordable housing within the coastal zone where feasible).

[119] Gov. Code § 65590(b).

[120] Gov. Code § 65590(d). This requirement does not apply to a project that has no housing impacts within that zone. Coalition of Concerned Communities, Inc. v. City of Los Angeles (2004) 34 Cal. 4th 733, 739, 21 Cal. Rptr. 3d 676, 101 P.3d 563 (project with no housing proposed within the Coastal Zone, only open space and infrastructure, is not subject to affordable housing requirement).

[121] Gov. Code § 65590(d).

[122] Gov. Code § 65590(d).

The definition of feasible is not limited to considering whether the developer can afford to provide low and moderate income housing. Rather, the statute defines feasible as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account the economic, environmental, social, and technical factors."[123]

[e] Accessory Dwelling Units

Accessory dwelling units (also known as ADUs, and previously often termed "granny flats") are attached or detached residential dwelling units that provide complete independent living facilities for one or more persons and are located on a lot with a primary residence.[124] A junior accessory dwelling unit (JADU) is a unit that is no more than 500 square feet in size and is contained entirely within a single-family residence.[125]

The Legislature has declared that in the face of a severe housing crisis in the state, accessory dwelling units[126] are "an essential component of California's housing supply," due to their potential to provide affordable housing options while benefiting homeowners who create them with added income.[127] To encourage their creation, the Legislature has enacted amendments to state law over time that limit local agencies'[128] ability to restrict accessory dwelling units and streamline their approval.

State law sets standards by which an accessory dwelling unit must be approved ministerially by a local jurisdiction. The law allows local governments to enact their own ordinances allowing accessory dwelling units in single-family and multi-family zones but specifies maximum restrictions that may be placed in such an ordinance.[129] The state requirements are designed to expedite and incentivize the creation of accessory dwelling units. The requirements include:

- The ordinance must provide that a permit application for an accessory dwelling unit or a junior accessory dwelling unit must be considered and approved ministerially without discretionary review or a hearing. The ordinance must require that the permitting agency act on the application within 60 days from the date the local agency receives a completed application if there is an existing single-family or multifamily dwelling on the lot. If the local agency has not acted upon the completed application within 60 days, the application shall be

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[123] Gov. Code § 65590(g)(3).

[124] Gov. Code § 65852.2(j)(1).

[125] Gov. Code § 65852.22(h)(1).

[126] *See* Gov. Code § 65852.2(j)(1)

[127] Gov. Code § 65852.150

[128] *See* Gov. Code § 65852.2(j)(5).

[129] *See* Gov. Code § 65852.2(a)(1) for extensive list of mandatory components of a local government's accessory dwelling unit ordinance; see also Gov. Code § 65852.2(h), which requires submittal of such an ordinance to the Department of Housing and Community Development within 60 days of adoption to allow the Department to comment on the ordinance.

deemed approved.[130]

- The ordinance may not include requirements on minimum lot size.[131]
- The ordinance may not establish: (1) a minimum square footage requirement that prohibits an efficiency unit; (2) a maximum square footage requirement that is less than either 850 square feet for an accessory dwelling unit that provides one bedroom or less, or 1,000 square feet for an accessory dwelling unit that provides more than one bedroom; or (3) any other minimum or maximum size for an accessory dwelling unit, or limits on lot coverage, floor area ratio, open space, and minimum lot size that does not permit at least an 800 square foot accessory dwelling unit that is at least 16 feet in height.[132]
- The ordinance must provide that any accessory dwelling unit that complies with the state requirements is not considered to exceed the allowable density and is consistent with the existing general plan and zoning designation for the lot.[133]
- The ordinance must prohibit additional setback requirements for accessory dwelling units within an existing living area or an accessory structure constructed in the same location as an existing structure that is converted. A setback of no more than four feet from the side and rear lot lines may be required for an accessory dwelling unit that is newly constructed.[134]
- Parking requirements for accessory dwelling units in the ordinance may not exceed one parking space per accessory dwelling unit or per bedroom, whichever is less.[135]
- When a garage, carport, or covered parking structure is demolished in conjunction with the construction of an accessory dwelling unit or converted to an accessory dwelling unit, the ordinance may not require that those off street parking spaces be replaced.[136]
- The ordinance cannot provide more restrictive standards for the creation of an accessory dwelling unit;[137] however, local agencies may adopt less restrictive

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[130] Gov. Code § 65852.2(a)(3).

[131] Gov. Code § 65852.2(a)(1)(B).

[132] Gov. Code § 65852.2(c).

[133] Gov. Code § 65852.2(a)(1)(C).

[134] Gov. Code § 65852.2(a)(1)(D)(vii).

[135] *See* Gov. Code § 65852.2(a)(1)(D)(x) (parking requirements); *see* Gov. Code § 65852.2(d) (identification of certain circumstances where no parking requirement for accessory dwelling units may be imposed).

[136] Gov. Code § 65852.2(a)(1)(D)(xi).

[137] Gov. Code § 65852.2(a)(6). Until January 1, 2025, a local agency is prohibited from imposing an owner-occupant requirement, and such a requirement cannot be imposed on accessory dwelling units established between January 1, 2020 to January 1, 2025. Gov. Code § 65852.2(a)(6); *see also* Coalition Advocating Legal Housing Options v. City of Santa Monica (2001) 88 Cal. App. 4th 451, 454, 105 Cal. Rptr. 2d 802 (city ordinance allowing the creation of accessory dwelling units in single-family residential zones only if the person occupying the unit was the property owner or his/her dependent, or a caregiver

requirements.[138]

A local ordinance governing the creation of accessory dwelling units that preexisted recent amendments to state law must also comply with the requirements of Gov. Code § 65852.2(a), including the requirement to provide a ministerial approval process. A preexisting accessory dwelling unit ordinance that fails to meet these requirements is null and void. No other local ordinance, policy, or regulation may be the basis for the delay or denial of a building permit or a use permit for an accessory dwelling unit.[139]

If a local agency does not adopt an ordinance governing accessory dwelling units, it must still consider a permit application for an accessory dwelling unit or a junior accessory dwelling unit ministerially without discretionary review or a hearing. The permitting agency must act on the application within 60 days from the date the local agency receives a completed application if there is an existing single-family or multifamily dwelling on the lot. If the local agency has not acted upon the completed application within 60 days, the application shall be deemed approved.[140]

In addition to the requirements outlined above for permit applications, a local agency must ministerially approve an application for a building permit within a residential or mixed-use zone to create any of the following:[141]

- One accessory dwelling unit or junior accessory dwelling unit per lot with a proposed or existing single-family dwelling if certain conditions apply.[142]
- One detached, new construction, accessory dwelling unit that does not exceed four-foot side and rear yard setbacks for a lot with a proposed or existing single-family dwelling, which may be combined with a junior accessory dwelling unit that complies with certain conditions.[143] A local agency may impose the additional conditions on the accessory dwelling unit.[144]
- Multiple accessory dwelling units (up to 25 percent of the existing multifamily dwelling units) within the portions of existing multifamily dwelling structures that are not used as livable space,[145] if each unit complies with state building standards for dwellings.[146]
- Not more than two detached accessory dwelling units that are located on a lot

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for the property owner or dependent, violated the state constitutional rights of privacy and equal protection).

[138] Gov. Code § 65852.2(g).

[139] Gov. Code § 65852.2(a)(5).

[140] Gov. Code § 65852.2(b).

[141] Gov. Code § 65852.2(e).

[142] See Gov. Code § 65852.2(e)(1)(A) for conditions.

[143] Gov. Code § 65852.2(e)(1)(B); *see* Gov. Code § 65852.2(e)(1)(A) for conditions.

[144] Gov. Code § 65852.2(e)(1)(B).

[145] Such spaces include, but are not limited to, storage rooms, boiler rooms, passageways, attics, basements, or garages. Gov. Code § 65852.2(e)(1)(C).

[146] Gov. Code § 65852.2(e)(1)(C).

that has an existing multifamily dwelling and that are no greater than 16 feet in height and provide four-foot rear and side setbacks.[147]

A local agency shall not require as a condition for such ministerial approval, the correction of nonconforming zoning conditions.[148]

Gov. Code § 65852.2 sets forth additional restrictions and requirements applicable to a local agency's treatment of accessory dwelling units.[149] State law does not restrict local agencies from applying less restrictive requirements to the creation of accessory dwelling units.[150]

PRACTICE TIP: Consult Agency Publication. The California Department of Housing and Community Development publishes a useful guide to establishing accessory dwelling units. *See* "Accessory Dwelling Unit Handbook," Calif. Dept. of Housing & Community Development (December 2020).[151]

[f] Redevelopment Plans

Although dissolved in 2012,[152] redevelopment agencies were formerly one of the leading sources of funding for affordable housing. Under the former law governing redevelopment, redevelopment agencies were required to earmark at least 20 percent of tax increment revenues toward the development of low and moderate income housing.[153] These requirements are often embedded in approved Redevelopment Plans, some of which are still in effect and are now enforced by local planning agencies.

[g] State Housing Law Building Standards

Design solutions to increase housing supply include reduced unit sizes for so-called "micro housing" and co-living or co-housing, in which multiple unrelated people live together as a single household unit. These housing types and uses may be protected by the right to privacy[154] (*see* § 60.65 *above*), but also may be protected by statewide housing and building codes. Co-living buildings are typically run by a single operator, and residents have individual leases or agreements that allow them to live in the

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147 Gov. Code § 65852.2(e)(1)(D).

148 Gov. Code § 65852.2(e)(2); see Gov. Code § 65852.2(e)(3)–(4) for additional restrictions and requirements related to such ministerial approval.

149 *See* Gov. Code § 65852.2(f) (related to fees and utilities); *see* Gov. Code § 65852.2(k) (related to certificates of occupancy); *see* Gov. Code § 65852.2(n) (related to delay in enforcement of buildings standards).

150 Gov. Code § 65852.2(g).

151 *See* https://www.hcd.ca.gov/policy-research/docs/adu_december_2020_handbook.pdf.

152 AB 26 1x (Chapter 5, Stats. 2011). AB 26 1x prohibited redevelopment agencies from engaging in new business and provided for their dissolution. Health & Safety Code §§ 34161–34168, 34170–34191.6.

153 Health & Safety Code § 33334.2(a).

154 City of Santa Barbara v. Adamson (1980) 27 Cal. 3d 123, 164 Cal. Rptr. 539, 610 P.2d 436.

building. Individuals may share bedrooms or have their own bedrooms. While local governments may have valid reasons for regulating co-living housing, they cannot impose occupancy requirements for dwelling units that are more stringent than the occupancy requirements set forth in the State Uniform Housing Code.[155] The building standards adopted in the state law[156] preempt local occupancy ordinances, which may be designed to prevent overcrowding but have the effect of limiting housing availability.

[h] Bay Area Rapid Transit (BART) Housing Developments

In 2018, the Legislature declared that because of the San Francisco Bay Area Rapid Transit District's (BART's) unique status as a transit agency governed by a Board of Directors, it would grant the district an exception to the principle that land use authority must be reserved to cities and counties. It granted the district a limited measure of land use authority over the parcels it owns in the immediate vicinity of its stations.[157] Accordingly, the Legislature directed the BART Board of Directors to adopt, by ordinance, transit oriented development ("TOD") zoning standards for each station that establish minimum local zoning requirements for height, density, parking, and floor area ratio only and that apply to an eligible TOD project.[158] State law addresses travel demand management requirements for TOD projects on district-owned real property;[159] requirements applicable when the district's TOD zoning is inconsistent with local zoning;[160] review under the California Environmental Quality Act;[161] parking requirements for TOD projects;[162] and application requirements for TOD projects.[163]

Regarding affordable housing requirements, in addition the extensive replacement requirements,[164] an eligible TOD project must restrict at least 20 percent of residential housing units for occupancy by very low and low-income households. This restriction is subject to a recorded affordability restriction for at least 55 years in the case of rental units and 45 years in the case of owner-occupied units, in addition to replacement of affordable housing units.[165] Residential units for very low and low-income households are given priority. If a local jurisdiction's inclusionary housing requirement mandates a higher percentage of affordable units or a deeper level of affordability, then that

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[155] Briseno v. City of Santa Ana (1992) 6 Cal. App. 4th 1378, 1382, 8 Cal. Rptr. 2d 486, 489.

[156] Health and Safety Code § 17910 et seq.

[157] 2018 Stats., Ch. 1000, AB 2923, sec. 1(d).

[158] Pub. Util. Code § 29010.6(a); *see* Pub. Util. Code § 29010.1(a)(8) ("TOD project" defined); *see* Pub. Util. Code § 29010.1(a)(2) ("eligible TOD project" defined); *see* Pub. Util. Code § 29010.6(a)(2)–(4) (contents of zoning standards); *see* Pub. Util. Code § 29010.6(b) (adoption process).

[159] Pub. Util. Code § 29010.6(c).

[160] Pub. Util. Code § 29010.6(d); Pub. Util. Code § 29010.6(f).

[161] Pub. Res. Code § 21000 et seq.; Pub. Util. Code § 29010.6(e).

[162] Pub. Util. Code § 29010.6(g)–(i).

[163] Pub. Util. Code § 29010.7(b)–(d); Pub. Util. Code § 29010.9; Pub. Util. Code § 29010.10.

[164] Pub. Util. Code § 29010.8(a).

[165] Pub. Util. Code § 29010.8(b)(1)(A).

jurisdiction's affordability percentage requirements will apply.[166] The project must also comply with specified labor policies.[167] On district-owned land within the district's boundaries, the district must ensure that a total of 30 percent of housing units are affordable, with priority given to very low and low-income households.[168]

Most of the sections in this act are in effect until January 1, 2029, and as of that date are repealed.[169]

[i] Agricultural Employee Housing

An application for an eligible agricultural employee housing development,[170] which must be affordable to lower income households,[171] is subject to a streamlined, ministerial approval process.[172] That application is not subject to a conditional use permit if both of the following requirements are met:[173]

- The development is located on land designated as agricultural in the applicable general plan.
- The development is not located on specified types of sites, including sites within the coastal zone or wetlands; in very high fire hazard zones; in certain hazardous waste sites; in a delineated earthquake fault zone unless specified requirements are met; within a flood plain or floodway unless specified requirements are met; on lands identified for conservation in an adopted natural community conservation plan, habitat conservation plan, or other natural resources protection plan; on land under a conservation easement;[174] or on lands with groundwater levels within five feet of the soil surface and for which the development would use an onsite wastewater disposal system serving more than six family housing units.

The local government may conduct a development review or public oversight of the development, but such process must be objective and strictly focused on assessing compliance with criteria required for streamlined projects, as well as any reasonable

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[166] Pub. Util. Code § 29010.8(b)(1)(B), (2).

[167] Pub. Util. Code § 29010.8(b)(32); *see* Gov. Code § 65913.4 (labor requirements).

[168] Pub. Util. Code § 29010.8(c).

[169] *See* Pub. Util. Code §§ 29010.10 and 29010.11, which are instead in effect until January 1, 2031, and as of that date are repealed. Pub. Util. Code §§ 29010(b), 29010.11(c).

[170] *See* Health & Safety Code § 17021.8(i) ("eligible agricultural employee housing development" defined).

[171] *See* Health & Safety Code § 1702150079.5 ("lower income household" defined).

[172] Health & Safety Code § 17021.8(a). *See* Health & Safety Code § 17021.8(b)–(c) (approval process); Health & Safety Code § 17030.10 (application and review process for certifying that a person is an affordable housing organization qualified to operate agricultural employee housing that is approved pursuant to Health & Safety Code 17021.8).

[173] Health & Safety Code § 17021.8(a).

[174] "Conservation easement" does not include a contract executed pursuant to the Williamson Act, Gov. Code § 51200 et seq. Health & Safety Code § 17021.8(a)(2)(I).

objective development standards.[175] The development review or public oversight may not in any way inhibit, chill, or preclude the ministerial approval.

An agricultural employee housing development is not subject to the California Environmental Quality Act (Public Resources Code § 21000 et seq.).[176]

[j] Housing Sustainability Districts

[i] Creation of Housing Sustainability Districts

In 2017, the Governor signed into law a package of 15 bills designed to increase the availability of housing in California. One of those bills, AB 73 (Chiu) (2017 Cal. Stats., ch. 371) is intended to encourage private development of housing and mixed-use developments[177] through the creation of "housing sustainability districts." AB 73 authorizes a city, county, or city and county,[178] on receipt of preliminary approval by the Department of Housing and Community Development,[179] to establish by ordinance a housing sustainability district in accordance with Gov. Code § 66200 et seq.[180] A "housing sustainability district" is an area within a city, county, or city and county that is superimposed over an area within the jurisdiction of the city, county, or city and county in which a developer may elect to develop a project in accordance with either the housing sustainability district ordinance or the city's, county's, or city and county's otherwise applicable general plan and zoning ordinances.

AB 73 contains an extensive list of requirements that must be incorporated into the housing sustainability district ordinance, including affordability and prevailing wage requirements.[181] A housing sustainability district ordinance must remain in effect for no more than 10 years, except that the city, county, or city and county may renew the housing sustainability district ordinance, for an additional period not exceeding 10 years, before the date upon which it would otherwise be repealed pursuant to this subdivision.[182]

[ii] Location and Zoning

An area proposed to be designated a housing sustainability district must satisfy all of the following requirements:[183]

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[175] Health & Safety Code § 17021.8(c); *see* Health & Safety Code § 17021.8(c) ("objective development standards" defined); *see* Health & Safety Code § 17021.8(e) (specified objective development standards).

[176] Health & Safety Code § 17021.8(f).

[177] Gov. Code § 66201(d).

[178] "City, county, or city and county" includes a charter city, charter county, or charter city and county. Gov. Code § 66200(b).

[179] *See* Gov. Code § 66202 (preliminary approval).

[180] Gov. Code § 66201(a). The city, county, or city and county must adopt the ordinance in accordance with the requirements of Gov. Code § 65800 et seq.

[181] Gov. Code § 66201(f).

[182] Gov. Code § 66201(g).

[183] Gov. Code § 66201(b).

- The area is an eligible location, including any adjacent area served by existing infrastructure and utilities;
- The area is zoned to permit residential use through the ministerial issuance of a permit;[184]
- Density ranges for multifamily housing for which the minimum densities must not be less than those deemed appropriate to accommodate housing for lower income households,[185] and a density range for single-family attached or detached housing for which the minimum densities may not be less than 10 units to the acre;
- The development of housing is permitted, consistent with neighborhood building and use patterns and any applicable building codes;
- Limitations or moratoriums on residential use do not apply to any of the area, other than any limitation or moratorium imposed by court order;
- The area is not subject to any general age or other occupancy restrictions, except that the city, county, or city and county may allow for the development of specific projects exclusively for the elderly or the disabled or for assisted living;
- Housing units comply with all applicable federal, state, and local fair housing laws;
- The area of the proposed housing sustainability district does not exceed 15 percent of the total land area under the jurisdiction unless the department approves a larger area;
- The total area of all housing sustainability districts within the city, county, or city and county does not exceed 30 percent of the total land area under the jurisdiction;
- The housing sustainability district ordinance provides for the manner of review by an approving authority,[186] and in accordance with the rules and regulations adopted by the Department of Housing and Community Development; and
- Development projects in the area comply with requirements regarding the replacement of affordable housing units affected by the development.[187]

The city, county, or city and county may apply uniform development policies or standards that will apply to all projects within the housing sustainability district. They may include parking ordinances, public access ordinances, grading ordinances, hillside

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[184] Other uses may be permitted by conditional use or other discretionary permit, provided that the use is consistent with residential use. Gov. Code § 66201(b)(2).

[185] *See* Gov. Code § 65583.2(c)(3)(B).

[186] *See* Gov. Code § 66205.

[187] *See* Gov. Code § 66208 (replacement requirements).

development ordinances, flood plain ordinances, habitat or conservation ordinances, view protection ordinances, and requirements for reducing greenhouse gas emissions.[188]

[iii] Design Review Standards

A city, county, or city and county may adopt design review standards applicable to development projects within the housing sustainability district to ensure that the physical character of development within the district is complementary to adjacent buildings and structures, and is consistent with the city's, the county's, the or city and county's general plan, including the housing element.[189] The design review standards must be adopted at the same time as the housing sustainability district ordinance and submitted to the Department of Housing and Community Development with the city's, county's, or city and county's preliminary approval[190] application.[191] Any subsequent additional design review standards or amendment of existing design review standards will be subject to written approval by the Department of Housing and Community Development.[192]

Design review of a development within a housing sustainability district does not constitute a "project" for purposes of the California Environmental Quality Act (CEQA).[193]

[iv] Applicability of CEQA

A lead agency must prepare an environmental impact report (EIR) when designating a housing sustainability district, which must identify mitigation measures that may be undertaken by projects in the housing sustainability district to mitigate the environmental impacts identified by the Environmental Impact Report (EIR).[194]

CEQA requirements do not apply to a housing project undertaken in a housing sustainability district designated by a local government so long as (1) the lead agency certified an EIR for the housing sustainability district, (2) that district was approved by the Department of Housing and Community Development, and (3) the housing project complies with the conditions specified for the housing sustainability district and implements mitigation measures identified in the EIR for the housing sustainability district.[195]

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[188] Gov. Code § 66201(c).

[189] Gov. Code § 66207(a). "Design review standard" means the reasonable application of qualitative design requirements that are clear and concise and consistently applied to all types of development applications, with specific terms defined or generally accepted word definitions. Gov. Code § 66207(a).

[190] *See* Gov. Code § 66202 (preliminary approval process).

[191] Gov. Code § 66207(b).

[192] Gov. Code §§ 66201(e), 66207(b).

[193] Pub. Res. Code § 21000 et seq. (CEQA); Gov. Code § 66207(a). *See* Ch. 21, *Preliminary Review, Exemptions, and Negative Declarations,* § 21.05 (Projects Subject to CEQA); *see also* § 60.90[4][j], *above*, for discussion of the applicability of CEQA to housing sustainability districts.

[194] Pub. Res. Code § 21155.10.

[195] Pub. Res. Code § 21155.11.

[v] Permit Applications

An applicant for a project within a housing sustainability district must submit an application for a permit with the designated official and with the approving authority identified in the housing sustainability district ordinance.[196] The approving authority must conduct a public hearing and issue a written decision[197] on the application within 120 days of receipt of the application, unless extended by agreement between the approving authority and the applicant.[198] If the approving authority fails to act within 120 days, or within the period agreed upon by the approving authority and the applicant, as applicable, the application will be deemed approved.[199] In the event an application is deemed approved, the applicant must provide notice to any interested parties[200] and notify the official designated for this purpose in the ordinance, within 14 days of the application being deemed approved.[201]

The approving authority may deny an application only for the following reasons:[202]

- The proposed project does not fully comply with the housing sustainability district ordinance;
- The applicant has not submitted all of the required information or paid an application fee required by the housing sustainability district ordinance; or
- The approving authority determines, based on substantial evidence in light of the whole record of the public hearing on the project, that a physical condition on the site of development that was not known and could not have been discovered with reasonable investigation at the time the application was submitted would have a specific adverse impact[203] on the public health or safety and that there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact.

If the approving authority denies an application for a permit, or has approved it with conditions rendering the project infeasible for residential use, the applicant may appeal

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[196] Gov. Code § 662205(c)(1).

[197] The approving authority must issue to the applicant a copy of its written decision, including the name and address of the owner of the property proposed to be developed, an identification of the property proposed to be developed, the development plans, and certification that a copy of the decision has been filed with the official designated for this purpose in the housing sustainability district ordinance of the city, county, or city and county. Gov. Code § 66205(c)(4).

[198] Gov. Code § 662205(c)(2).

[199] Gov. Code § 662205(c)(3).

[200] The notice provided to interested parties must specify that any appeals must be filed within 20 days following the official's receipt of the notice. Gov. Code § 662205(c)(3).

[201] Gov. Code § 66205(c)(3).

[202] Gov. Code § 66205(d)(2).

[203] "Specific adverse impact" means a significant, quantifiable, direct, and unavoidable impact based on identified objective written public health or safety standards, policies, or conditions, as in existence at the time the application is deemed complete. Nothing in this subparagraph is intended to affect thresholds of significance or standards of review for any impact reviewed pursuant to CEQA. Gov. Code § 66205(d)(2)(C).

that decision by filing a complaint in the superior court within 20 days after the approving authority filed its decision.[204] The applicant must provide notice of the appeal and a copy of the complaint to that official and, within 14 days of filing the complaint, must serve written notice and provide a copy of the complaint to all defendants by certified mail.[205] The complaint must name the approving authority as a defendant and allege the specific reasons why the approving authority's decision does not satisfy the requirements of the ordinance, the provisions of the housing sustainability district law, or other applicable law.[206] The approving authority has the burden of proving that its decision satisfies the requirements of the ordinance, the provisions of the housing sustainability district law, or other applicable law based on substantial evidence in light of the whole record.[207]

[vi] Zoning Incentive Payments

A city, county, or city and county with a housing sustainability district approved by the department will be entitled to a zoning incentive payment, on appropriation of funds by the Legislature for that purpose.[208] The amount of the payment is based on the number of new residential units constructed within the housing sustainability district.[209] However, replacements for existing affordable housing units in the district,[210] and any units constructed by a developer who elects to not be subject to the housing sustainability district ordinance,[211] will not be considered new residential units for purposes of the incentive.[212]

The first half of the incentive payment is issued on the department's preliminary approval of the housing sustainability district ordinance and issuance of the environmental impact report prepared for the ordinance pursuant to Pub. Res. Code § 21155.10.[213] The department issues the second half of the zoning incentive payment within 10 days of submission of proof of issuance of building permits for the projected units of residential construction within the zone, provided that the city, county, or city and county has received a certificate of compliance for the applicable year.[214]

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[204] Gov. Code § 66206(a)–(b).

[205] Gov. Code § 66206(b).

[206] Gov. Code § 66206(c).

[207] Gov. Code § 66206(c).

[208] Gov. Code § 66204(a)(1).

[209] Gov. Code § 66204(a)(2).

[210] *See* Gov. Code § 66208.

[211] *See* Gov. Code § 66205(f).

[212] Gov. Code § 66204(a)(2).

[213] Gov. Code § 66204(b).

[214] Gov. Code §§ 66203, 66204(b).

[k] Workforce Housing Opportunity Zones

[i] Establishment of Zone

In 2017, the Legislature enacted SB 540,[215] authorizing local governments[216] to establish Workforce Housing Opportunity Zones ("WHOZs").[217] A local government may establish a WHOZ by preparing an environmental impact report pursuant to the California Environmental Quality Act[218] to identify and mitigate, to the extent feasible, environmental impacts resulting from the establishment of that zone. It must also adopt a specific plan that includes text and a diagram or diagrams specifying various components, including (1) minimum unit count and density requirements, (2) details regarding infrastructure, (3) implementation of specific mitigation measures in addition to the mitigation required by the EIR, (4) development and design review standards, and (5) funding mechanisms.[219]

Before beginning the formal environmental evaluation of the specific plan, the planning commission and the legislative body of the local government must each hold a public hearing, at least 30 days apart, to receive public comments about a draft of the specific plan.[220] Before approving a recommendation on the adoption of the specific plan, the planning commission must hold at least one public hearing.[221] The legislative body also must hold at least two public hearings to consider the planning commission's recommendation and any and all public testimony.[222] There must be a minimum of 30 days between the public hearings to allow sufficient time to modify the plan in response to the public testimony.[223]

Within five years of being adopted, the local government must reevaluate the specific plan pursuant to Pub. Res. Code § 21166, and must hold a noticed public hearing to consider amendments and readoption of the specific plan.[224]

A local government may submit an application to the Department of Housing and Community Development for a grant or no-interest loan, or both, to support its efforts

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[215] 2017 Cal. Stats., ch. 369 (SB 540).

[216] *See* Gov. Code § 65620(b) ("Local government" defined).

[217] *See* Gov. Code § 65620(c) ("Workforce Housing Opportunity Zone" defined).

[218] Pub. Res. Code § 21000 et seq.

[219] *See* Gov. Code § 65621(a) (required specific plan components).

[220] Gov. Code § 65621(b).

[221] Gov. Code § 65621(c)(1). The local government must provide the notice of the hearing pursuant to Gov. Code §§ 65090 and 65091(a)(1), (3), including notice to local agencies, owners of real property within the zone, and each owner of real property within 300 feet of the real property within the zone. Gov. Code § 65621(c)(1), (d).

[222] Gov. Code § 65621(c)(2). The local government must provide the notice of the hearing pursuant to Gov. Code §§ 65090 and 65091(a)(1), (3), including notice to local agencies, owners of real property within the zone, and each owner of real property within 300 feet of the real property within the zone. Gov. Code § 65621(c)(2), (d).

[223] Gov. Code § 65621(c)(2).

[224] Gov. Code § 65622.

to develop a specific plan and accompanying environmental impact report for a WHOZ.[225]

[ii] Project Approvals

For a period of five years from the adoption of the specific plan, the local government must approve a development[226] that satisfies all required elements of the specific plan[227] in effect at the time that the application for the development is deemed complete.[228] The amendment or readoption of the specific plan pursuant to Gov. Code § 65622 begins a new five-year period for this purpose.[229] However, if the local government finds, based on substantial evidence in the record of the public hearing on the development, that a physical condition of the site that was not known at the time the specific plan was prepared would have a specific, adverse impact[230] upon the public health or safety, the local government must either approve the development subject to a condition that satisfactorily mitigates or avoids the impact, or deny the development if the cost of complying with the condition renders the project unaffordable for the intended residents of low, moderate, or middle income and if approval would cause more than 50 percent of the total units in the zone to be sold or rented to persons and families of above moderate income.[231]

Notice that a local government has received an application for a housing development within a WHOZ must be posted on the local government's website and mailed or delivered within 10 days of receiving the application to any person who has filed a written request for notice with either the clerk of the governing body or with any other person designated by the governing body to receive these requests.[232]

The local government must approve a housing development proposed within the zone that is consistent with the specific plan and that qualifies for an exemption from the California Environmental Quality Act (CEQA)[233] pursuant to Gov. Code § 65623(c)[234] within 60 days of the date the application is deemed complete pursuant to the Permit Streamlining Act.[235]

The approval of a development that does not include a majority of the units that will be sold or rented to persons and families of lower income expires three years from the

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[225] Gov. Code § 65624(a); *see* Gov. Code § 65624(b) (Department of Housing and Community Development may adopt, amend, or repeal guidelines to implement grant or loan program).

[226] *See* Gov. Code § 65620(a) ("Housing development" or "development" defined).

[227] Gov. Code § 65621(a)(3)–(7).

[228] Gov. Code § 65623(a).

[229] Gov. Code § 65622(b).

[230] *See* Gov. Code § 65623(b) ("specific, adverse impact" defined).

[231] Gov. Code § 65623(a)(2).

[232] Gov. Code § 65623(d)(1).

[233] Pub. Res. Code § 21000 et seq.

[234] *See* Gov. Code § 65623(c).

[235] Gov. Code § 65623(d)(2); *see* Gov. Code § 65920 et seq. (Permit Streamlining Act).

date of the approval, if construction has not begun on the housing units in the development. A local government may grant one extension for an additional three-year period on a determination that good cause exists for the delay in commencing construction. A local government may not consider the same or a substantially similar project on the same parcel of property if the development expires.[236]

[iii] Exemption from CEQA Review

After the adoption of a WHOZ, a lead agency is not required to prepare an environmental impact report or negative declaration for a housing development that satisfies all of the following criteria:[237]

- The development is located on land within a WHOZ.
- The development is consistent with the WHOZ specific plan, including the established density ranges.[238]
- At least 30 percent of the total units constructed or substantially rehabilitated in the WHOZ will be sold or rented to persons and families of moderate income[239] or persons and families of middle income;[240] at least 15 percent of the total units constructed or substantially rehabilitated in the WHOZ will be sold or rented to lower income households;[241] and at least five percent of the total units constructed or substantially rehabilitated in the WHOZ will be restricted for a term of 55 years for very low income households.[242]
- No more than 50 percent of the total units constructed or substantially rehabilitated in the zone may be sold or rented to persons and families of above moderate income.[243]
- The developer must provide sufficient legal commitments to ensure the continued availability of units for very low, low-moderate-, or middle-income households for 55 years for rental units and 45 years for owner-occupied

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[236] Gov. Code § 65623(e).

[237] Gov. Code § 65623(c).

[238] Gov. Code § 65623(c)(2). If a development is not consistent with the elements and standards in the specific plan, the provisions of Gov. Code § 65623 will not apply and the local government must consider the application as it would an application for development that is not within the WHOZ, including the preparation of an environmental impact report or a negative declaration for the housing development. Gov. Code § 65623(c)(2).

[239] *See* Health & Safety Code § 50093 ("persons and families of moderate income" defined).

[240] *See* Gov. Code § 65008 ("persons and families of middle income" defined).

[241] *See* Health & Safety Code § 50079.5 ("lower income households" defined).

[242] Gov. Code § 65623(c)(3)(A); *see* Health & Safety Code § 50105 ("very low income households" defined). A development that is affordable to persons and families whose income exceeds the income limit for persons and families of moderate income must include no less than 10 percent of the units for lower income households at affordable housing cost, as defined by Section 50052.5 of the Health and Safety Code, unless the locality has adopted a local ordinance that requires greater than 10 percent of the units, in which case that ordinance applies. Gov. Code § 65623(c)(8).

[243] Gov. Code § 65623(c)(3)(A).

units.[244]

- The development incorporates each of the mitigation measures adopted pursuant to Gov. Code § 65621(a)(3) and deemed applicable by the local government.[245]
- The development has incorporated each of the uniformly applied development standards adopted pursuant to Gov. Code § 65621(a)(5) and deemed applicable by the local government.[246]
- The development complies with the design review standards adopted pursuant to Gov. Code § 65621(a)(7) and deemed applicable by the local government.[247]
- The development proponent has certified that either one of the following is true: (1) the entirety of the project is a public work for purposes of Lab. Code §§ 1720 et seq.; or, if the project is not in its entirety a public work, (2) all construction workers employed in the execution of the project will be paid at least the general prevailing rate of per diem wages for the type of work and geographic area, as determined pursuant to Lab. Code §§ 1773 and 1773.9, except that apprentices registered in programs approved by the Chief of the Division of Apprenticeship Standards may be paid at least the applicable apprentice prevailing rate.[248]

[I] CEQA Streamlining to Support Housing

The Legislature has facilitated affordable housing through streamlining opportunities, including exemptions, under the California Environmental Quality Act (CEQA) and the CEQA Guidelines. These streamlining opportunities cover a wide array of projects that provide affordable housing,[249] including but not limited to transit priority projects,[250] infill projects,[251] and agricultural housing projects.[252]

For detailed coverage of CEQA, see Chapters 20–23.

§ 60.91 Regional Planning

[1] Intersection of Regional Planning and Local Zoning

The concept of regional planning was developed to more effectively and uniformly address planning problems and issues that stretch across city and county political

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[244] Gov. Code § 65623(c)(3)(B).

[245] Gov. Code § 65623(c)(4).

[246] Gov. Code § 65623(c)(5).

[247] Gov. Code § 65623(c)(6).

[248] Gov. Code § 65623(c)(9); *see* Gov. Code § 65623(c)(9)(B)(i)–(vi) (requirements applicable to portions of project that are not public works).

[249] *See* Gov. Code § 65913.4; Pub. Resources Code § 21159.23.

[250] *See* Pub. Resources Code §§ 21155, 21155.1, and 21155.2.

[251] *See* Pub. Resources Code § 21159.24.

[252] *See* Pub. Resources Code § 21159.22.

boundaries. Importantly, however the requirements and prescriptions of zoning remain limited to local jurisdictions. Nevertheless, regional planning goals and policies often intersect with and influence local zoning requirements.

Various regional planning agencies and regional planning requirements have been created by the state Legislature. These represent a significant departure from traditional local land use and zoning controls exercised by local governments under their police powers. Generally, the Legislature has acted in unique geographic areas or with respect to difficult land uses to ensure that actions by local jurisdictions do not undermine regional goals. Subsections [2]–[10], *below*, identify these statutory regional planning agencies and other regional planning legislation and discuss their impacts on local zoning.

PRACTICE TIP: Assess Potential Impact of Regional Planning Issues on Projects. When representing development projects, you should be careful to identify regional planning issues and assess the potential impact of regional planning agency requirements early on in the development process. If your client is considering acquiring a particular tract of land for a project, it is imperative to include an assessment of regional planning issues and impacts as a component of your due diligence. A few simple steps at the beginning can avert significant problems later on:

- Identify whether your project is within a regional planning zone or district, such as the coastal zone[1] or an airport approach zone.[2]
- Review the powers and authority of the relevant regional planning agency to determine the scope of its involvement in the approval process.
- Contact the regional planning agency's staff early in the entitlement process to discuss the proposed project informally, even if local approvals are first required, to ensure that the regional agency's issues are addressed at the onset.

For detailed coverage of regional planning, see Chapter 62, *Planning*.

[2] Governor's Office of Planning and Research

The Office of Planning and Research (OPR) is a statewide land use, development, conservation, and environmental planning advisory agency.[3] The OPR assists local government planning and zoning by, among other activities, developing guidelines for the preparation of local general plans,[4] providing technical assistance to local

[1] Pub. Res. Code § 30000 et seq.

[2] Pub. Util. Code § 21670 et seq.

[3] Gov. Code § 65040 et seq.

[4] Gov. Code § 65040.2.

governments regarding planning problems,[5] and developing guidelines for the implementation of the California Environmental Quality Act (CEQA).[6] Despite these activities, the OPR has no actual land use authority.

The recommendations and concerns of local governments are considered by the Planning Assistance and Advisory Council (PLAAC), a body within the OPR comprised of representatives from cities, counties, regional planning districts, and Indian tribes.[7]

For a complete discussion of the OPR and regional planning, see Chapter 62, *Planning*.

[3] Airport Land Use Commissions

The existence of an airport served by a scheduled airline triggers several planning and zoning issues. These involve special airport land use commissions (ALUCs),[8] airport land use compatibility plans (ALUPs) for each public use airport,[9] consistency requirements between ALUPs and local government actions and plans,[10] and local zoning prescriptions.[11]

The purpose of an ALUC is to ensure the orderly expansion of public airports and minimize land use, noise, and safety conflicts between public airports and adjacent areas.[12] To accomplish these purposes, ALUCs are vested with certain powers and duties that impact local zoning, including the following:

- Adoption and administration of airport land use compatibility plans;[13]
- Review of certain local agency actions for consistency with ALUPs;[14] and
- Adoption of rules and regulations necessary to fulfill the duties of the ALUC.[15]

However, the ALUC has no jurisdiction over the actual operation of a public airport.[16]

The ALUP is the central component of ALUC regulatory power regarding airport planning and zoning. The ALUC establishes the airport influence area around each

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[5] Gov. Code § 65040.3.

[6] Pub. Res. Code § 21083.

[7] Gov. Code § 65040.6(a).

[8] Pub. Util. Code § 21670 et seq.

[9] Pub. Util. Code §§ 21674(c), 21675.

[10] Pub. Util. Code § 21676.

[11] Gov. Code § 50485 et seq.; *see* § 60.12[3].

[12] Pub. Util. Code § 21670(a)(2).

[13] Pub. Util. Code § 21674(c); *see* Pub. Util. Code §§ 21675 and 21675.1 (formulation and administration of ALUPs).

[14] Pub. Util. Code §§ 21674(d), 21676; *see* Pub. Util. Code § 21675.2 (procedures for approval and disapproval of agency actions).

[15] Pub. Util. Code § 21674(f).

[16] Pub. Util. Code § 21674(e).

public airport after a public hearing and consultation with the involved agencies,[17] but the jurisdiction of an ALUC is limited to the boundaries of the county in which it is established.[18] An ALUP will typically include standards and restrictions commonly found in zoning codes, including the following within the ALUP's influence area:

- Height restrictions on buildings;
- Permissible and conditional uses of land; and
- Soundproofing and other building standards.[19]

Local governments within the ALUP planning boundaries must refer proposed zoning ordinances, building regulations, and general or specific plan amendments to the ALUC, which will determine whether the proposal is consistent with the ALUP.[20] If the ALUC determines the proposed action is not consistent with the ALUP, a local government may overrule the ALUC finding by a two-thirds vote after holding a public hearing that followed procedures articulated in the statute.[21]

In addition to the ALUC structure, state law empowers local governments to adopt airport approach zones.[22] A primary difference between the airport approach zone statute and the ALUC statute is that the ALUC statute only pertains to public airports, that is, airports served by a scheduled airline.[23] In contrast, the airport approach zone statute applies to "any area of land or water designed and set aside for the landing and taking off of aircraft and utilized or to be utilized in the interest of the public for such purposes."[24]

Within an airport approach zone, local governments may regulate the uses and heights of structures and trees next to airports.[25] Zoning restrictions in airport approach zones must be reasonably related to the purpose of preventing airport hazards.[26] The local government must also consider the following issues when adopting airport approach zone regulations:

- The nature of the terrain in which the airport is located;
- The character of the flying operations expected to be conducted at the airport;

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[17] Pub. Util. Code § 21675(c).

[18] 74 Ops. Cal. Atty. Gen. 58 (1991).

[19] Pub. Util. Code § 21675(a).

[20] Pub. Util. Code § 21676(b).

[21] Pub. Util. Code § 21676(b); *see* 87 Ops. Cal. Atty. Gen. 102 (2004) (elaborate statutory procedures for identifying and resolving inconsistencies between specific plan and Airport Land Use Compatibility Plan make it clear that ALUCs may not grant "exemptions" for specific plan with less stringent standards than compatibility plan).

[22] Gov. Code § 50485 et seq.

[23] Pub. Util. Code § 21670(b).

[24] Gov. Code § 50485.1.

[25] Gov. Code § 50485.3.

[26] Gov. Code § 50485.7.

- The character of the neighborhood near the airport; and
- The current and potential land uses of the property zoned.[27]

For further coverage of regional airport planning, see CALIFORNIA REAL ESTATE LAW AND PRACTICE, Chapter 264, *Uses Presenting Significant Regulatory Problems*, Part B (Matthew Bender).

[4] Joint Powers Agreements

Joint Powers Agreements (JPAs) may be used to create regional planning authorities or to cooperatively manage a resource or land use that crosses jurisdictional boundaries. The Joint Powers Act permits two or more public agencies to enter an agreement to jointly exercise any power common to the contracting parties.[28] Each member agency of a JPA must have independent authority to perform the activity agreed to be performed jointly.[29] Therefore, the Joint Powers Act "grants no new powers to municipalities, but merely sets up a new procedure for the exercise of existing powers."[30]

Because all cities and counties have the power to regulate land use, cities and counties may establish regional planning agencies by entering JPAs. The Southern California Association of Governments (SCAG) is such an agency, comprised of 130 cities within six counties. Although SCAG has no actual authority over local land uses, it has extensive regional planning responsibilities in southern California. SCAG serves as the Regional Transportation Planning Agency, responsible for preparing and administering the Regional Transportation Improvement Plan, and serves as the areawide Waste Treatment Planning Agency, responsible for preparing and implementing the Southern California Hazardous Waste Management Plan.[31] SCAG also reviews all local Congestion Management Plans for consistency with regional transportation plans.[32]

In addition to regional planning agencies, local governments often enter JPAs to plan, manage, or operate specific projects. For example, the cities of Burbank, Glendale, and Pasadena formed the Burbank-Glendale-Pasadena Airport Authority under a JPA to operate the Burbank-Glendale-Pasadena Airport.[33]

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[27] Gov. Code § 50485.7.

[28] Gov. Code § 6500 et seq.

[29] 71 Ops. Cal. Atty. Gen. 266 (1988) (two school districts do not have authority to establish joint powers agency to contract with private entity to secure supply agreements because school districts do not have independent authority to grant a private entity power to bind school districts in contracts).

[30] City of Oakland v. Williams (1940) 15 Cal. 2d 542, 549, 103 P.2d 168; 60 Ops. Cal. Atty. Gen. 206 (1977).

[31] *See* https://scag.ca.gov/post/about-us-history-of-scag.

[32] *See* https://scag.ca.gov/sites/main/files/file-attachments/0903fconnectsocal_congestion-management.pdf?1606001549. For a discussion of regional transportation planning, see § 60.91[6], *below*.

[33] *See* https://hollywoodburbankairport.com/airport-authority/.

[5] Solid Waste Management

The siting and permitting of solid waste facilities has regional implications and is regulated by statewide legislation. In 1989, the state Legislature reorganized solid waste management and planning by repealing the California Solid Waste Management Resource and Recovery Act[34] and the California Solid Waste Control Act[35] and adopting the California Integrated Waste Management Act.[36] The Act requires each county to prepare an integrated waste management plan (CoIWMP) to replace existing solid waste management plans.[37] There are five mandatory components of a CoIWMP:

- A source reduction and recycling element for each city and the county;
- A household hazardous waste element for each city and the county;
- A countywide siting element for new and expanded solid waste facilities;
- A nondisposal facility element for each city and the county; and
- A summary of significant solid waste problems facing the county and stated goals to address these problems.[38]

After a CoIWMP has been approved by the Department of Resources Recycling and Recovery (successor to the California Integrated Waste Management Board),[39] no person is entitled to establish or expand a solid waste facility in the county unless the solid waste facility meets either of the following criteria:

- The solid waste facility is a disposal or transformation facility, or an engineered municipal solid waste (EMSW) conversion facility, the location of which is identified in the countywide siting element; or
- The solid waste facility is a facility that is designed to, and which as a condition of its permit will, recover for reuse or recycling at least 5 percent of the total volume of material received by the facility.[40]

The person or agency proposing the facility must submit a facility site identification and description to the Local Task Force (LTF), which must meet and comment in writing on the proposed facility within 90 days of receipt.[41] The LTF comments must include a discussion of the relationship between the proposed facility and the

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[34] Former Gov. Code §§ 66700–66794.5.

[35] Former Gov. Code §§ 66795–66796.24.

[36] Pub. Res. Code § 40000 et seq.

[37] Pub. Res. Code § 41750.

[38] Pub. Res. Code §§ 41750–41751.

[39] In 2009, the Legislature abolished the California Integrated Waste Management Board and transferred the duties and responsibilities of the Board to the newly-created Department of Resources Recycling and Recovery within the Natural Resources Agency. 2009 Stats., ch. 21 (SB 63); Pub. Res. Code § 40400 et seq. In 2012, the Department was transferred to the California Environmental Protection Agency. Governor's Reorg. Plan No. 2, § 303.

[40] Pub. Res. Code § 50001(a).

[41] Pub. Res. Code § 50001(c).

implementation requirements of Pub. Res. Code § 41780, which requires a 50 percent diversion of solid waste through source reduction or recycling, except as these requirements may be met by approved alternatives.[42] The LTF comments must also discuss the facility's regional impact. The comments must be transmitted to the person or agency proposing the facility, the county, and all cities within the county, becoming part of the facility's public record.

The issuance of a revised permit for a solid waste disposal site was not improper on the basis that it allowed expanded operations. For expansions, Pub. Res. Code § 50001 only requires that the location of the disposal facility appear in the siting element. It does not require that the siting element be changed so that the expansion conforms with the siting element.[43]

For further discussion of regional waste planning, see Chapter 90, *Solid Waste Management and Planning*.

[6] Transportation Planning

Regional transportation planning is most often concerned with overall traffic reduction and ensuring adequate regional traffic circulation. The goals and policies of regional transportation planning are sometimes provided by statutory planning agencies, such as the San Francisco Bay Area's Metropolitan Transportation Commission.[44] Sometimes regional transportation planning is also provided by joint powers authorities, such as the Southern California Association of Governments.[45]

Local governments must conform to regional Congestion Management Plans (CMPs) or face losing state funding for streets and highways.[46] In response to congestion management mandates by the state Legislature,[47] local governments have developed zoning standards for trip reduction and methods to identify regional circulation impacts. Some codes now include transportation demand management measures, provide parking standards for carpool and vanpool parking, and measures to facilitate telecommuting.[48] In addition, increased density or reduced parking may be permitted near transportation centers such as regional commuter train stations.[49]

To support the state's greenhouse gas emissions reduction goals, the Legislature established the Sustainable Communities and Climate Protection Act,[50] which incen-

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[42] Pub. Res. Code § 50001(c); *see* Pub. Res. Code §§ 41783–41785.

[43] Sustainability, Parks, Recycling & Wildlife Defense Fund v. Department of Resources Recycling & Recovery (2018) 34 Cal. App. 5th 676, 701.

[44] Gov. Code § 66502.

[45] *See* § 60.91[4], *above*.

[46] Gov. Code § 65089.5(b)(1).

[47] Gov. Code §§ 65088–65089.10.

[48] *See, e.g.,* Chino Hills Development Code, ch. 9.67; Los Angeles Municipal Code § 12.26(J) (transportation demand management and trip reduction measures).

[49] *See, e.g.,* Los Angeles Municipal Code § 12.27(J).

[50] SB 375 (Chapter 728, Stats. 2008)

tivizes infill development near transit opportunities. The Act requires each regional metropolitan planning organization to develop, in conjunction its regional transportation plan,[51] a Sustainable Communities Strategy (SCS), or long-range plan that aligns transportation, housing, and land use decisions toward achieving GHG emissions reduction targets set by the California Air Resources Board.[52] Although SCSs set regional planning goals, they do not regulate land use, and local governments' land use policies, including its general plan, are not required to be consistent with the applicable SCS.[53] Transit priority projects[54] that are consistent with the general use designation, density, building intensity, and applicable policies specified in the applicable SCS are exempt or otherwise subject to streamline procedures under the California Environmental Quality Act.[55]

For a further discussion of regional transportation planning, see CALIFORNIA REAL ESTATE LAW AND PRACTICE, Chapter 252, *State and Regional Planning* (Matthew Bender).

[7] Tahoe Regional Planning Agency

The Tahoe Regional Planning Agency (TRPA) is a joint commission between California and Nevada, established by interstate compact, to develop and enforce a land use plan for the Lake Tahoe region.[56] The TRPA regional plan includes elements for public facilities, recreation, land use, transportation, and conservation. The TRPA evaluates all projects within the planning boundaries for conformance with the regional plan. The TRPA Compact defines "project" as "any activity undertaken by any person, including a public agency, if the activity may affect the land, water, air space, or any other natural resources of the region."[57] Thus, local government planning and zoning activities as well as project approvals are subject to review by the TRPA, and the TRPA may bring an action to compel local government compliance with the regional plan.[58]

For complete coverage of the TRPA, see Chapter 69, *Tahoe Regional Planning Agency*.

[8] California Coastal Commission

The Coastal Act established the California Coastal Commission to regulate development along California's coast.[59] Local governments in the coastal zone are required to prepare Local Coastal Programs (LCPs) containing local land use plans and

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[51] Gov. Code §§ 65080(a), 65080(b)(1).

[52] Gov. Code § 65080(b)(2).

[53] Gov. Code § 65080(b)(2)(J).

[54] Pub. Res. Code § 21155(b) ("transit priority project" defined).

[55] Pub. Res. Code § 21155 et seq.

[56] Gov. Code §§ 66800–67132.

[57] Gov. Code § 66801, art. II(h).

[58] Gov. Code § 66801, art. VI(k).

[59] Pub. Res. Code § 30001.2.

ordinances.[60] Although coastal development permits are required for all developments within the coastal zone,[61] local governments retain significant responsibilities over land use approvals. Once a local government's LCP is certified by the Coastal Commission,[62] coastal development permits are issued by the local government according to its certified LCP, subject only to appellate review by the Coastal Commission.[63] The Coastal Commission has promulgated regulations governing coastal development permits issued by local governments.[64] However, in jurisdictions without a certified LCP, coastal development permits must be obtained directly from the state Commission.

For complete coverage of the California Coastal Commission, see Chapter 66, *Coastal Zone Regulation*.

[9] San Francisco Bay Area Conservation and Development Commission

The state Legislature established the San Francisco Bay Conservation and Development Commission (BCDC) to develop and administer a plan for conserving San Francisco Bay and developing the shoreline.[65] The BCDC grants and denies permits for any project involving extracting materials from, placing fill on, or making substantial changes in the use of water, land, or structures in the BCDC's jurisdiction.[66]

The BCDC's permitting powers subject many land uses that would normally be exclusively within local zoning jurisdiction to additional review by the BCDC.[67]

For complete coverage of the San Francisco BCDC, see Chapter 67, *The San Francisco Bay Conversation and Development Commission.*

[10] Delta Protection Commission

The Delta Protection Act established the Delta Protection Commission (DPC), which is comprised of 19 member agencies, to protect the natural resources of the Sacramento-San Joaquin Delta.[68] The DPC has adopted a regional plan to which all local government general plans must conform. A local government may not approve a development within the DPC protection zone unless it finds that the development will not adversely impact wetlands, non-point source pollution, or agriculture. Despite the

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[60] Pub. Res. Code §§ 30510–30513.

[61] Pub. Res. Code § 30600(a).

[62] Pub. Res. Code §§ 30510–30525.

[63] Pub. Res. Code § 30600.5.

[64] 14 Cal. Code Reg. § 13300 et seq.

[65] Gov. Code § 66600 et seq.

[66] Gov. Code § 66604.

[67] *See, e.g.,* Mein v. San Francisco Bay Conservation etc. Com. (1990) 218 Cal. App. 3d 727, 735–736, 267 Cal. Rptr. 252 (BCDC validly ordered removal of or substantial alterations to modification of bayfront home completed without BCDC permit); Acme Fill Corp. v. San Francisco Bay Conservation etc. Com. (1986) 187 Cal. App. 3d 1056, 1065–1066, 232 Cal. Rptr. 348 (expansion of waste disposal site one mile inland from San Francisco Bay subject to BCDC review).

[68] Pub. Res. Code § 29700 et seq.

impact of such requirements on local zoning decisions, establishment of the DPC did not usurp the constitutional grant of police powers to local governments because the DPC's powers are regional, not local.[69]

For further coverage of the DPC, see Chapter 70, *Agricultural Preservation*, § 70.45.

§ 60.92 Other Statewide Concerns

[1] The California Outdoor Advertising Act

Outdoor advertising, including billboards and signs, is subject to state-wide regulation. The California Outdoor Advertising Act (Act)[1] regulates advertising displays adjacent to and visible from interstate or state highways and any other highways in unincorporated areas in California. All advertising displays must be permitted under the Act and comply with local zoning ordinances, as well as with regulations set forth in the Act.

The Act contains a number of provisions designed to protect the property interests of outdoor advertisers in light of increasing local regulation. A validly constructed billboard in California constitutes a protectable property interest entitled to due process protection.[2] The Act does all of the following with regard to protecting billboard owners:

- It requires that compensation be paid for forced removal of billboards;[3]
- It provides specified amortization periods for the removal or modification of non-conforming billboards;[4]
- It protects preexisting billboards from removal when new regulations would materially impair the billboard's visibility;[5] and
- It allows for the relocation of lawful billboards by mutual agreement between the jurisdiction and the billboard owner.[6]

The California Department of Transportation (CalTrans) is the state agency responsible for administering and enforcing the Act.[7] Local jurisdictions (city or county) retain authority to exercise general zoning power with respect to signage.[8]

Although the Act contains certain preemption provisions, it also allows for stricter local regulation under certain circumstances. Although the state cannot condition the

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[69] 76 Ops. Cal. Atty. Gen. 145 (1993).

[1] *See* Bus. & Prof. Code § 5200 et seq. (California Outdoor Advertising Act).

[2] Traverso v. People ex rel. Dept. of Transportation (1993) 6 Cal. 4th 1152, 1161, 26 Cal. Rptr. 2d 217, 864 P.2d 488.

[3] Bus. & Prof. Code § 5412.

[4] Bus. & Prof. Code § 5499.1(a)(3).

[5] Bus. & Prof. Code § 5499.

[6] Bus. & Prof. Code § 5412.

[7] Bus. & Prof. Code §§ 5250–5254.

[8] Bus. & Prof. Code § 5443(a).

issuance of a permit for a billboard on compliance with local ordinances,[9] local ordinances must also be followed. The Act "expressly recognizes local authorities' power to regulate the 'placement' of a billboard," and it specifically "allows local authorities to require a permit for the placement of a sign."[10]

The Act does not preclude application of county or city billboard ordinances with respect to a billboard placed in an area that was unincorporated at the time of its placement. In light of the entire statutory scheme, Bus. & Prof. Code § 5270 does not preempt county limitations—or city-enacted limitations following annexation—on billboards in unincorporated areas that are stricter than the limitations set forth in the Act.[11]

The Outdoor Advertising Act contains numerous exemptions. It does not apply to, among other things, official notices, signage giving directions, signs regarding the sale or lease or real property, signage at qualified arenas, or signs constituting purely on-site business identification.[12] Regulation of signage is more strict with regard to segments of freeways designated as "landscaped" or "scenic highways."[13] Beginning in 2017, the Act contains an exemption for certain types of outdoor advertising within a specified freeway adjacent area of the downtown portion of the City of Los Angeles, if the outdoor advertising is regulated by a city adopted sign district or specific plan ordinance.[14]

§ 60.93 Governmental Compliance With Local Zoning

[1] Identity and Activity Determines Compliance

The identity and activity of a governmental entity determines whether it must adhere to local land use regulations. By virtue of the supremacy clause, the federal government is largely exempt from compliance with city or county zoning ordinances.[1] Similarly, the state government is largely shielded from local controls under the doctrine of state sovereign immunity.[2] With some exceptions, cities and counties enjoy reciprocal

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[9] Traverso v. People ex rel. Dept. of Transportation (1996) 46 Cal. App. 4th 1197, 1209, 54 Cal. Rptr. 2d 434.

[10] Lamar Advertising Company v. County of Los Angeles (2018) 22 Cal. App. 5th 1294, 1301, 232 Cal. Rptr. 3d 394, citing Bus. & Prof. Code §§ 5229, 5231.

[11] D'Egidio v. City of Santa Clarita (2016) 4 Cal. App. 5th 515, 529–530, 209 Cal. Rptr. 3d 176.

[12] *See* Bus. & Prof. Code §§ 5442, 5442.5(b), 5272, 5274(a).

[13] *See* Bus. & Prof. Code §§ 5216, 5440(a), 5440.1.

[14] Bus. & Prof. § 5272.2, added by 2016 Stats., ch. 853 (A.B. 1373), § 2; *see, e.g.*, L.A. Sports & Entertainment District Specific Plan § 16 (L.A. City Ordinance 174,224).

[1] U.S. Const. art. VI, cl. 2; *see* § 60.93[2], *below* (federal compliance with local zoning); § 60.68[1] (elements of federal preemption).

[2] Hall v. City of Taft (1956) 47 Cal. 2d 177, 183, 302 P.2d 574, *see* § 60.93[3], *below*; *City of Malibu v. Santa Monica Mountains Conservancy* (2002) 98 Cal. App. 4th 1379, 1383, 119 Cal. Rptr. 2d 777; *Bame v. City of Del Mar* (2001) 86 Cal. App. 4th 1346, 1358, 104 Cal. Rptr. 2d 183; *Laidlaw Waste Systems, Inc. v. Bay Cities Services, Inc.* (1996) 43 Cal. App. 4th 630, 635, 50 Cal. Rptr. 2d 824; *Del Norte Disposal, Inc. v. Department of Corrections* (1994) 26 Cal. App. 4th 1009, 1013–1015, 31 Cal. Rptr. 2d 746.

intergovernmental immunity regarding property they own in each other's jurisdictions.[3] Statutory law largely determines whether school districts and other local agencies are subject to local government land use regulations.[4]

[2] Federal Government

[a] Preemption

The supremacy clause prohibits states from hindering the constitutional exercise of power by the federal government or its instrumentalities,[5] unless Congress affirmatively consents to such control.[6] Consequently, otherwise valid state or local regulations are preempted.[7] For example, the U.S. District Court for the Northern District of California refused to enjoin construction of a non-conforming post office, reasoning that compliance with the zoning ordinance would burden the Postal Service.[8] Even when the federal government is a lessee of land privately developed for its use, local zoning ordinances are preempted if they interfere with proper government functions.[9]

Regulations promulgated under federal law have the same preemptive effect.[10] Indeed, federal regulations can be so pervasive as to completely preempt local regulation of specific land use issues.[11]

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[3] County of Los Angeles v. City of Los Angeles (1963) 212 Cal. App. 2d 160, 166, 28 Cal. Rptr. 32; 40 Ops. Cal. Atty. Gen. 231 (1962); *see* § 60.93[5], *below*.

[4] *See* § 60.93[4], *below*, for discussion of the application of local zoning requirements to school districts.

[5] McCulloch v. Maryland (1819) 17 U.S. (4 Wheat.) 316, 427, 436, 4 L. Ed. 579.

[6] Hancock v. Train (1976) 426 U.S. 167, 179, 96 S. Ct. 2006, 48 L. Ed. 2d 555.

[7] Johnson v. Maryland (1920) 254 U.S. 51, 57, 41 S. Ct. 16, 65 L. Ed. 126 (postal employees exempt from state driver's license statute because it interfered with their duties under federal law); United States v. Pittsburg (9th Cir. 1981) 661 F.2d 783, 785–786 (local ordinance banning shortcuts by letter carriers invalid because it frustrated congressional goal of expedient mail delivery); Rust v. Johnson (9th Cir. 1979) 597 F.2d 174, *cert. denied*, 444 U.S. 964, 100 S. Ct. 450, 62 L. Ed. 2d 376 (city's property foreclosure which failed to protect federal mortgage interest held unconstitutional); *see* § 60.68 for a discussion of preemption.

[8] Stewart v. United States Postal Service (N.D. Cal. 1980) 508 F. Supp. 112, 116; *see also* U.S. Postal Service v. City of Hollywood, Fla. (S.D. Fla. 1997) 974 F. Supp. 1459, 1465.

[9] United States v. Pittsburg (9th Cir. 1981) 661 F.2d 783, 785–786; 68 Ops. Cal. Atty. Gen. 310 (1985) (Postal Service need not comply with county zoning for construction on land owned or leased by United States); *see* Ventura County v. Gulf Oil Corp. (9th Cir. 1979) 601 F.2d 1080, 1083, *aff'd mem.*, 445 U.S. 947, 100 S. Ct. 1593, 63 L. Ed. 2d 782 (1980) (lessees of United States are immune from zoning regulations that conflict with statute authorizing lease); *but see* Smith v. County of Santa Barbara (1988) 203 Cal. App. 3d 1415, 1424–1425, 251 Cal. Rptr. 1 (construction of building to be leased to federal government not exempt from local land use regulations when owner did not yet have a lease with the federal government and the federal government was not involved in construction or planning).

[10] Grover City v. United States Postal Service (C.D. Cal. 1975) 391 F. Supp. 982, 986–987.

[11] *See, e.g.,* Burbank v. Lockheed Air Terminal, Inc. (1973) 411 U.S. 624, 93 S. Ct. 1854, 36 L. Ed. 2d 547 (comprehensive federal regulation of aircraft scheduling precluded local curfews).

[b] Consent

The federal government may divest itself of sovereignty by explicit congressional directive to comply with local law.[12] For example, the Atomic Energy Commission was required to adhere to local law when constructing overhead power lines because the Atomic Energy Act expressly stated that local authority to regulate power transmissions remained unaffected.[13] Other examples of federal consent to comply with local laws include statutory provisions relating to urban land use[14] and the Intergovernmental Cooperation Act.[15] Federal agencies are also required to comply with the National Environmental Policy Act (NEPA),[16] which requires that the environmental impacts of proposed projects by federal agencies be reviewed and grants local governments the right to comment on and challenge the adequacy of federal agency findings. Note, however, that the federal government's "consent" is often limited only to a requirement that the federal government must "consider" the viewpoints or plans of state and local governmental entities.

[c] Indian Lands

The federal law allowing states to exercise civil and criminal jurisdiction over Indian tribes[17] has been narrowly interpreted with regard to local land use regulations.[18] Courts have refused to extend the statutory grant of state jurisdiction over Indian lands to local governments.[19] The Ninth Circuit Court of Appeals essentially precluded all local land use regulation on Indian land by ruling that "[i]t is beyond question that land use regulation is within the tribe's sovereign authority over its lands."[20]

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[12] P.I. Wilsey & Co. v. County of San Bernardino (1957) 155 Cal. App. 2d 145, 146, 317 P.2d 71.

[13] Maun v. United States (9th Cir. 1965) 347 F.2d 970, 975.

[14] 40 U.S.C. §§ 901–905 (requiring that acquisition, use, and disposition of land in urban areas be consistent, to greatest extent possible, with zoning and land use practices as well as local planning objectives).

[15] 31 U.S.C. § 6506 (providing that regional, state, and local viewpoints must be considered in planning federal or federally assisted development projects).

[16] 42 U.S.C. § 4332.

[17] 28 U.S.C. § 1360.

[18] California v. Cabazon Band of Mission Indians (1987) 480 U.S. 202, 207, 222–223, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (holding that state gambling regulations do not apply to bingo games on Indian reservations); United States v. County of Humboldt (9th Cir. 1980) 615 F.2d 1260, 1261–1262 (providing that county zoning and building regulations inapplicable on Indian land without express grant of power from Congress); People v. Naegele Outdoor Advertising Company (1985) 38 Cal. 3d 509, 521, 213 Cal. Rptr. 247, 698 P.2d 150, *cert. denied*, 475 U.S. 1045, 106 S. Ct. 1260, 89 L. Ed. 2d 570 (invalidating state regulation of outdoor advertising on Indian reservations adjacent to state highways).

[19] Segundo v. City of Rancho Mirage (9th Cir. 1987) 813 F.2d 1387, 1390 (holding local rent control ordinance inapplicable to mobile home park on Indian land); Santa Rosa Band of Indians v. Kings County (9th Cir. 1975) 532 F.2d 655, 661, *cert. denied*, 429 U.S. 1038 (1977) (holding county had no jurisdiction to enforce its zoning and building code on Indian land).

[20] Segundo v. City of Rancho Mirage (9th Cir. 1987) 813 F.2d 1387, 1393.

[d] Coastal Development Permits

A coastal development permit may be required for activities on federal lands. Although the federal Mining Act of 1872[21] and various U.S. Forestry Service regulations allow private citizens to enter on federal lands to explore for mineral deposits, these laws do not preempt the state from requiring that a mining operation apply for and abide by the conditions of a coastal development permit issued by the California Coastal Commission.[22] The Supreme Court rejected arguments that the property clause of the U.S. Constitution[23] preempts state regulation of otherwise lawful activity on federal land. The property clause was asserted as the basis for preemption, rather than the supremacy clause, because the appellant mining company was a private entity acting on federal land. "The property clause itself does not automatically conflict with all state regulation of federal land," the Supreme Court ruled.[24] The Supreme Court then determined that nothing in the Mining Act nor the Forestry Service regulations preempted the state's coastal development permit regulation.

[3] State Government

[a] Sovereign Immunity

Under the doctrine of sovereign immunity, the state and its agencies are not subject to local regulations of any sort when engaging in sovereign activities unless the state constitution or Legislature so mandates.[25] Sovereign immunity applies whether the sovereign owns or leases the land,[26] and whether the local regulator is a charter or general law jurisdiction.[27] However, where a state agency leased property as a revenue-producing activity to a private entity, and the activities had no relation to governmental function of the state agency, the doctrine of sovereign immunity did not shield either the agency or the lessee from local regulation.[28]

Sovereign immunity extends not only to the state but also to certain statewide instrumentalities and state agencies of limited territorial jurisdiction. For example, the

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[21] 30 U.S.C. § 22 et seq.

[22] California Coastal Com. v. Granite Rock Co. (1987) 480 U.S. 572, 593–594, 107 S. Ct. 1419, 94 L. Ed. 2d 577.

[23] U.S. Const. art. IV, § 3, cl. 2.

[24] California Coastal Com. v. Granite Rock Co. (1987) 480 U.S. 572, 580–581, 107 S. Ct. 1419, 94 L. Ed. 2d 577.

[25] Hall v. Taft (1956) 47 Cal. 2d 177, 185, 302 P.2d 574; Regents of University of California v. City of Santa Monica (1978) 77 Cal. App. 3d 130, 136, 143 Cal. Rptr. 276; Bame v. City of Del Mar (2001) 86 Cal. App. 4th 1346, 1358, 104 Cal. Rptr. 2d 183.

[26] Hall v. City of Taft (1956) 47 Cal. 2d 177, 181–183, 302 P.2d 574 (state as owner); City of Orange v. Valenti (1974) 37 Cal. App. 3d 240, 244, 112 Cal. Rptr. 379 (state as lessee).

[27] *See* Regents of University of California v. City of Santa Monica (1978) 77 Cal. App. 3d 130, 136, 143 Cal. Rptr. 276.

[28] Board of Trustees of California State University and Colleges v. City of Los Angeles (1975) 49 Cal. App. 3d 45, 49–50, 122 Cal. Rptr. 361; Attard v. Board of Supervisors of Contra Costa County (2017) 14 Cal. App. 5th 1066, 1081, 223 Cal. Rptr. 3d 521.

Regents of the University of California are exempt from local land use regulations and permit fees because the Regents are a branch of the state itself.[29] The Regents are also exempt from local subdivision requirements when constructing on-campus housing.[30] Similarly, the Southern California Rapid Transit District's proposed Metro Rail subway for Los Angeles was ruled exempt from the local general plan because the District is a regional body with statewide concerns and thus an entity of the state.[31]

A city's zoning law may be preempted to the extent it conflicts with a valid order of the Public Utilities Commission (PUC).[32] The Attorney General has also suggested that local zoning does not bind agricultural districts which operate many of the county fairs in California, or their lessees.[33] However, state agencies must give written notification to the appropriate city or county 60 days before expanding, leasing, or constructing a building within the city's or county's jurisdiction.[34]

[b] Consent

The state can waive its sovereign immunity by statute, but that waiver must be express and not implied.[35] The Legislature has explicitly given its consent to local zoning control over state activities in a number of important areas.[36] For example, local agencies[37] that perform state governmental or proprietary functions and state agencies of limited territorial jurisdiction generally must comply with city and county zoning and building ordinances.[38] This requirement applies to hospital districts,[39] redevelopment agencies (to the extent local zoning regulations do not conflict with state redevelopment law),[40] and water districts.[41] The requirement does not apply to certain activities, such

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[29] Regents of University of California v. City of Santa Monica (1978) 77 Cal. App. 3d 130, 136, 143 Cal. Rptr. 276.

[30] 75 Ops. Cal. Atty. Gen. 78 (1992).

[31] Rapid Transit Advocates, Inc. v. Southern Cal. Rapid Transit Dist. (1986) 185 Cal. App. 3d 996, 1000, 230 Cal. Rptr. 225.

[32] Harbor Carriers, Inc. v. City of Sausalito (1975) 46 Cal. App. 3d 773, 775, 121 Cal. Rptr. 577.

[33] 56 Ops. Cal. Atty. Gen. 210 (1973).

[34] Gov. Code § 14681.5; City of Pasadena v. State of California (1993) 14 Cal. App. 4th 810, 834, 17 Cal. Rptr. 2d 766, 78, disapproved of on other grounds by Western States Petroleum Assn. v. Superior Court (1995) 9 Cal. 4th 559, 38 Cal. Rptr. 2d 139, 888 P.2d 1268 (notification sent by state to city stating that one of several sites would be chosen for project satisfied statutory requirement, even though no notice was given specifically identifying the particular site which was ultimately chosen).

[35] City of Malibu v. Santa Monica Mountains Conservancy (2002) 98 Cal. App. 4th 1379, 13841, 19 Cal. Rptr. 2d 777; Bame v City of Del Mar (2001) 86 Cal. App. 4th 1346, 1356, 104 Cal. Rptr. 2d 183; Laidlaw Waste Systems, Inc. v. Bay Cities Services, Inc. (1996) 43 Cal. App. 4th 630, 635, 50 Cal. Rptr. 2d 824; Del Norte Disposal, Inc. v. Department of Corrections (1994) 26 Cal. App. 4th 1009, 31 Cal. Rptr. 2d 746.

[36] *See* Gov. Code §§ 53090–53097.

[37] *See* Gov. Code § 53090(a) ("local agency" defined).

[38] Gov. Code § 53091.

[39] 55 Ops. Cal. Atty. Gen. 375 (1972).

[40] Redevelopment Agency v. City of Berkeley (1978) 80 Cal. App. 3d 158, 170, 143 Cal. Rptr. 633.

as the use of facilities integral to water storage and transmission and production or generation of electrical energy.[42] However, one court held that the state did not consent to local solid waste regulations by passing the Integrated Waste Management Act.[43]

Finally, local agencies[44] that perform state governmental or proprietary functions within limited boundaries must seek a determination of conformance with the general plan of the applicable local government.[45] Such a local agency may overrule a finding of nonconformance and proceed with its nonconforming project.[46]

[c] Coastal Development Permits

The California Coastal Act[47] requires every person to obtain a coastal development permit from the local government if a certified Local Coastal Program (LCP) is in place,[48] and the Act defines "person" to include the state and its agencies.[49] Thus, state or state agency developments located within the local jurisdiction must secure a coastal permit, and they may do so only if the project complies with the LCP.[50] State or state agency developments must also secure a coastal development permit from the Coastal Commission where no LCP has been certified.[51]

[4] School Districts

Before the enactment of Gov. Code §§ 53090–53095, school districts were exempt from local zoning because public education was an issue of statewide concern.[52] Today, Gov. Code §§ 53091 and 53094 require school districts to comply with local zoning ordinances that specify locations for public schools in the city's or county's general plan. Because most local jurisdictions contain these specifications, Gov. Code §§ 53091 and 53094 successfully undercut the sovereign immunity rule regarding school district

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[41] 78 Ops. Cal. Atty. Gen. 31 (1995).

[42] Gov. Code §§ 53090(a), 53091(d)–(e); *see* City of Lafayette v. East Bay Municipal Utility Dist. (1993) 16 Cal. App. 4th 1005, 1014, 20 Cal. Rptr. 2d 658 (exemption for water district facilities applies only to facilities that are directly and immediately used to produce, generate, store, or transmit water); City of Hesperia v. Lake Arrowhead Community Services Dist. (2019) 37 Cal. App. 5th 734, 755, 250 Cal. Rptr. 3d 82, 98 (exemption for the production or generation of electrical energy does not apply to the location or construction of facilities for the storage or transmission of electrical energy).

[43] Del Norte Disposal, Inc. v. Dept. of Corrections (1994) 26 Cal. App. 4th 1009, 1015, 31 Cal. Rptr. 2d 746 (interpreting Pub. Res. Code § 40000 et seq. and ruling that local solid waste ordinance did not apply to state prison).

[44] *See* Gov. Code § 65402(c) ("local agency" defined).

[45] Gov. Code § 65402(c).

[46] Gov. Code § 65402(c).

[47] Pub. Res. Code § 30000 et seq.; *see* Ch. 66, *Coastal Zone Regulation*.

[48] Pub. Res. Code § 30600(a).

[49] Pub. Res. Code § 30111.

[50] 65 Ops. Cal. Atty. Gen. 88, 93 (1982).

[51] Pub. Res. Code § 30600(c).

[52] Hall v. City of Taft (1956) 47 Cal. 2d 177, 181–183, 302 P.2d 574; Town of Atherton v. Superior Court (1958) 159 Cal. App. 2d 417, 421, 324 P.2d 328.

compliance with local zoning. However, school district governing boards may exempt classroom projects from local zoning ordinances by a two-thirds vote.[53] The decision to exempt is entirely within the governing board's discretion, provided its action is not arbitrary or capricious.[54] School district governing boards may not issue zoning exemptions for charter schools.[55]

Other statutes enable local planning agencies[56] and the Department of Education[57] to review a school district's land use proposals for conformity with the general plan. However, the school district may overrule a planning agency's disapproval[58] and the Department's recommendation is only made upon request of the school district and is merely advisory.[59] School districts are required to comply with local ordinances regulating design and construction of drainage, roadway, or grading improvements.[60]

[5] Cities and Counties; Intergovernmental Immunity

Cities and counties are expressly exempt from the class of agencies subject to local land use ordinances.[61] Property owned by a city or county within the jurisdiction of another city or county is therefore not subject to the zoning requirements of that city or county.[62] Moreover, absent an expression of legislative intent to the contrary, a zoning ordinance does not bind the city or county which enacts it.[63]

However, intergovernmental immunity is not limitless. A city or county may not freely transfer its immunity to a lessee without regard for the activities to be conducted on the land.[64] Intergovernmental immunity will apply only if the lessee's activity furthers the public function of the local government leasing the property for private

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[53] Gov. Code § 53094(b); Before voting, the school district must have complied with Gov. Code § 65352.2 (meetings with local planning agencies) and Pub. Res. Code § 21151.2 (notice to planning commission before acquisition of property for school site). Gov. Code § 53094(b). The school district may not take a vote when the proposed use of the property is for nonclassroom facilities. Gov. Code § 53094(b); *see* Cooper v. Rancho Santiago College (1990) 226 Cal. App. 3d 1281, 1287, 277 Cal. Rptr. 69 (use of a community college parking lot for swap meet was a nonclassroom facility).

[54] Gov. Code § 53094(c); *see* City of Santa Clara v. Santa Clara Unified School District (1971) 22 Cal. App. 3d 152, 156–159, 99 Cal. Rptr. 212.

[55] San Jose Unified School Dist. v. Santa Clara County Office of Education (2017) 7 Cal. App. 5th 967, 980, 213 Cal. Rptr. 3d 241.

[56] *See* Gov. Code §§ 65402(c), 65403(c).

[57] *See* Educ. Code § 17251(a).

[58] *See* Gov. Code §§ 65402(c), 65403(c).

[59] Educ. Code § 17251(a).

[60] Gov. Code § 53097.

[61] Gov. Code § 53090(a).

[62] Lawler v. City of Redding (1992) 7 Cal. App. 4th 778, 783, 9 Cal. Rptr. 2d 392; Akins v. Sonoma County (1967) 67 Cal. 2d 185, 194, 60 Cal. Rptr. 499; County of Los Angeles v. City of Los Angeles (1963) 212 Cal. App. 2d 160, 166, 28 Cal. Rptr. 32; 40 Ops. Cal. Atty. Gen. 243 (1962).

[63] C.J. Kubach Co. v. McGuire (1926) 199 Cal. 215, 217, 248 P. 676.

[64] 57 Ops. Cal. Atty. Gen. 124 (1974).

use.[65] If a city or county has adopted a general plan, another city or county may not construct or authorize a public building or structure within the other city or county's jurisdiction until the location, purpose, and extent of the project has been submitted to and reported on by the proper planning agency as to conformity with the general plan.[66] But nothing in Gov. Code § 65402(b) specifically precludes a city or county from constructing a project in another city or county if the other planning agency determines the project would be inconsistent with its general plan.

At least one court has held that the statute exempts cities from compliance with county general plans for projects in unincorporated areas of the county, requiring only that cities submit projects to counties for the required planning agency report.[67] A county must provide 60 days prior written notice to a city in whose jurisdiction the county is planning to expand, lease, or construct a building. However, a city council may waive this notice requirement by adopting a resolution.[68]

§§ 60.94–60.99 [Reserved]

9. Judicial Review of Zoning Restrictions

§ 60.100 Scope of Review

[1] Legislative and Quasi-Judicial Decisions Distinguished

There are two types of government actions with respect to zoning decisions: legislative actions and quasi-judicial decisions. The adoption of a zoning ordinance, including a rezoning of a single parcel or an amendment to a zoning ordinance, is a legislative act.[1] The granting of a variance or a conditional use permit is a quasi-judicial or adjudicatory act.[2] The scope of review by the courts of a given zoning decision depends on whether it is legislative or quasi-judicial in character. Briefly, a legislative act will be supported if it is rationally based, whereas a quasi-judicial action must be supported by evidence and findings of fact. In distinguishing between the legislative and adjudicatory actions of agencies, a legislative act is one that determines what the rules must be for the general regulation of future cases falling under its provisions,

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[65] 57 Ops. Cal. Atty. Gen. 124 (1974).

[66] Gov. Code § 65402(b).

[67] Lawler v. City of Redding (1992) 7 Cal. App. 4th 778, 783, 9 Cal. Rptr. 2d 392.

[68] Gov. Code § 25351.

[1] Yost v. Thomas (1984) 36 Cal. 3d 561, 570, 205 Cal. Rptr. 801, 685 P.2d 1152 (amendment to legislative act is a legislative act); Arnel Development Co. v. City of Costa Mesa (1980) 28 Cal. 3d 511, 514, 169 Cal. Rptr. 904, 620 P.2d 565.

[2] Arnel Development Co. v. City of Costa Mesa (1980) 28 Cal. 3d 511, 518 n.8, 169 Cal. Rptr. 904, 620 P.2d 565; City of Fairfield v. Superior Court (1975) 14 Cal. 3d 768, 773 n.1, 122 Cal. Rptr. 543, 537 P.2d 375 (use permit); Topanga Assn. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 514, 113 Cal. Rptr. 836, 522 P.2d 12 (variance); Essick v. City of Los Angeles (1950) 34 Cal. 2d 614, 623, 213 P.2d 492.

while an adjudicatory act applies the law to determine specific rights based on specific facts ascertained from evidence presented at a hearing.[3]

[2] Review of Legislative Decisions

Challenges to an agency's legislative actions are reviewed under Code Civ. Proc. § 1085, which provides for ordinary or traditional mandamus.[4] Traditional mandamus is also the remedy for challenges to ministerial acts.[5] Judicial review is limited to an examination of the proceedings before the agency to determine whether the action was arbitrary, capricious, or entirely lacking in evidentiary support, or whether the agency failed to follow the procedure or give the notices required by law.[6] Under this deferential standard, courts determine whether the legislative action taken was "reasonably related to the public welfare."[7]

A zoning ordinance will be upheld if it is reasonably related to the public welfare.[8] Zoning regulations are presumed constitutional,[9] and their reasonable relationship to the public welfare need only be "fairly debatable."[10] Zoning can be challenged on the grounds that it is arbitrary and unreasonable, or bears no reasonable relationship to the regional welfare.[11]

The standard of review for zoning ordinances adopted through the initiative or referendum process is the same as that for zoning adopted by legislative action.[12] However, in such cases, the courts cautiously guard the democratic process, and zoning initiatives (and referenda) are afforded special protection if pre-election judicial review

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[3] San Diego Bldg. Contractors Assn. v. City Council (1974) 13 Cal. 3d 205, 212, 118 Cal. Rptr. 146, 529 P.2d 570, *appeal dismissed*, 427 U.S. 901, 96 S. Ct. 3184, 49 L. Ed. 2d 1195 (1976); City of Rancho Palos Verdes v. City Council (1976) 59 Cal. App. 3d 869, 883, 129 Cal. Rptr. 173.

[4] Code Civ. Proc. § 1085; Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 35 n.2, 112 Cal. Rptr. 805, 520 P.2d 29.

[5] Court House Plaza Co. v. City of Palo Alto (1981) 117 Cal. App. 3d 871, 883, 173 Cal. Rptr. 161, *appeal dismissed*, 454 U.S. 1071, 102 S. Ct. 624, 70 L. Ed. 2d 607 (action to compel issuance of building permits).

[6] Pitts v. Perluss (1962) 58 Cal. 2d 824, 833, 27 Cal. Rptr. 19, 377 P.2d 83.

[7] Consaul *v. City of San Diego* (1992) 6 Cal. App. 4th 1781, 1791–92, 8 Cal. Rptr. 2d 762; *see* Arcadia Dev. Co. v. City of Morgan Hill (2011) 197 Cal. App. 4th 1526, 1536, 129 Cal. Rptr. 3d 369 ("A land use ordinance is a valid exercise of the police power if it bears a substantial and reasonable relationship to the public welfare." (citations omitted)).

[8] Associated Home Builders Etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 604, 135 Cal. Rptr. 41, 557 P.2d 473; *see generally* § 60.50.

[9] Lockard v. City of Los Angeles (1949) 33 Cal. 2d 453, 460, 202 P.2d 38, *cert. denied*, 337 U.S. 939, 69 S. Ct. 1516, 93 L. Ed. 1744.

[10] Associated Home Builders Etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 606, 135 Cal. Rptr. 41, 557 P.2d 473.

[11] Arnel Development Co. v. City of Costa Mesa (1980) 28 Cal. 3d 511, 521, 169 Cal. Rptr. 904, 620 P.2d 565; *see* Ch. 65, *Takings and Other Constitutional Controls*.

[12] Building Industry Assn. v. City of Camarillo (1986) 41 Cal. 3d 810, 821–822, 226 Cal. Rptr. 81, 718 P.2d 68.

is sought. The California Supreme Court has protected the initiative as one of the most important rights of the democratic process[13] and urged the courts to guard this power.[14] The power of initiative must be liberally construed, and doubts reasonably resolved in favor of its preservation.[15]

[3] Review of Quasi-Judicial Decisions

Quasi-judicial actions of agencies such as issuance of conditional use permits and variances are challenged under Code Civ. Proc. § 1094.5, which provides for administrative mandamus.[16]

As set forth in Code Civ. Proc. § 1094.5(b), the scope of review extends to the following questions: (1) whether the agency proceeded without or in excess of jurisdiction, (2) whether the agency provided a fair trial, and (3) whether there was any prejudicial abuse of discretion.[17] Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.[18] Evidence in actions under Code Civ. Proc. § 1094.5 is limited to the administrative record before the agency except when there is additional evidence that could not with reasonable diligence have been presented at the administrative hearing or was improperly excluded.[19] All avenues for administrative appeal must be exhausted before a court action can be filed, and all issues must be raised before the administrative body in order to be preserved for judicial review.[20]

If the challenged order or decision substantially affects a fundamental vested right (such as an existing professional license or an established business), the court, in deciding whether or not the evidence supports the agency's findings, exercises its independent judgment on the evidence and must find an abuse of discretion if the weight of the evidence fails to support the findings.[21] However, when no fundamental vested rights are involved, as is usually the case in land use and environmental

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[13] Associated Home Builders Etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 591, 135 Cal. Rptr. 41, 557 P.2d 473.

[14] Legislature v. Deukmejian (1983) 34 Cal. 3d 658, 683, 194 Cal. Rptr. 781, 669 P.2d 17.

[15] Assembly v. Deukmejian (1982) 30 Cal. 3d 638, 652, 180 Cal. Rptr. 297, 639 P.2d 939, *appeal dismissed sub. nom.* Republican National Committee v. Burton (1982) 456 U.S. 941.

[16] Code Civ. Proc. § 1094.5.

[17] Code Civ. Proc. § 1094.5(b).

[18] Code Civ. Proc. § 1094.5(b); *see* Woods v. Superior Court (1981) 28 Cal. 3d 668, 679, 170 Cal. Rptr. 484, 620 P.2d 1032 (abuse of discretion claimed to result from failure to proceed in manner required by law).

[19] Code Civ. Proc. § 1094.5(e); Western States Petroleum Assn. v. Superior Court (1995) 9 Cal. 4th 559, 578, 38 Cal. Rptr. 2d 139, 888 P.2d 1268.

[20] *See generally* Ch. 12, *Judicial Review of Administrative Decisions*.

[21] Code Civ. Proc. § 1094.5(c); Strumsky v. San Diego County Employees Retirement Assn (1974) 11 Cal. 3d 28, 44, 112 Cal. Rptr. 805, 520 P.2d 29; *see* Fukuda v. City of Angels (1999) 20 Cal. 4th 805, 817, 85 Cal. Rptr. 2d 696, 977 P.2d 693 (when exercising independent judgment in administrative mandamus proceeding, trial court must afford strong presumption of correctness to administrative findings, and party

litigation, the scope of review is limited to whether there is substantial evidence, in light of the whole record, to support the agency's findings, and whether the findings support the agency's decision.[22] Substantial evidence is any reasonable evidence, and conflicting evidence need not be weighed.[23] In making this determination, the court must resolve reasonable doubts in favor of the agency's findings and decision, and the court may not substitute its judgment for that of the local agency.[24]

Adjudicatory or quasi-judicial actions taken by a municipality must be accompanied by written findings explaining the decision-making body's analysis.[25] The findings must "bridge the analytic gap between the raw evidence and the ultimate decision or order" and must be supported by substantial evidence in the record.[26]

Administrative mandate is appropriate to challenge the issuance or denial of a conditional use permit.[27] A timely action must be brought to challenge any conditions prior to use of the privileges of the permit; a permittee who fails to challenge the limitations imposed on him or her by the permit waives any right to object.[28] However, a timely challenge to a conditional use permit or variance is necessary only as it relates to conditions lying within the discretion of a city's zoning authority, and not to matters beyond its power.[29] Thus, "a void and unlawful, or unconstitutional, use condition will not be perpetuated" for failure of the permittee to bring a timely challenge.[30]

A valid challenge to the issuance of a conditional use permit is not within the anti-SLAPP statute, and a local government may not file a special motion to strike[31] a

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challenging administrative decision bears burden of convincing court that administrative findings are contrary to weight of evidence).

[22] Code Civ. Proc. § 1094.5(b), (c); Topanga Assn. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 514–515, 113 Cal. Rptr. 836, 522 P.2d 12; Strumsky v. San Diego County Employees Retirement Assn (1974) 11 Cal. 3d 28, 44–45, 112 Cal. Rptr. 805, 520 P.2d 29; Harris v. City of Costa Mesa (1994) 25 Cal. App. 4th 963, 31 Cal. Rptr. 2d 1; *see* Saad v. City of Berkeley (1994) 24 Cal. App. 4th 1206, 1212–1213, 30 Cal. Rptr. 2d 95 (court held that single adequate finding will support agency's denial of conditional use permit).

[23] Western States Petroleum Assn. v. Superior Court (1995) 9 Cal. 4th 559, 573–575, 38 Cal. Rptr. 2d 139, 888 P.2d 1268.

[24] Pescosolido v. Smith (1983) 142 Cal. App. 3d 964, 970–971, 191 Cal. Rptr. 415; McMillan v. American General Finance Corporation (1976) 60 Cal. App. 3d 175, 182, 131 Cal. Rptr. 462.

[25] Topanga Assn. for a Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 515, 113 Cal. Rptr. 836, 522 P.2d 12.

[26] Topanga Assn. for a Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 515, 113 Cal. Rptr. 836, 522 P.2d 12.

[27] *See* Wheeler v. Gregg (1949) 90 Cal. App. 2d 348, 362, 203 P.2d 37.

[28] County of Imperial v. McDougal (1977) 19 Cal. 3d 505, 510–511, 138 Cal. Rptr. 472, 564 P.2d 14.

[29] Anza Parking Corp. v. City of Burlingame (1987) 195 Cal. App. 3d 855, 861, 241 Cal. Rptr. 175.

[30] Anza Parking Corp. v. City of Burlingame (1987) 195 Cal. App. 3d 855, 861, 241 Cal. Rptr. 175 (construing former Gov. Code § 65907, which has been recodified as Gov. Code § 65009(c)(1)(E)).

[31] *See* Code Civ. Proc. § 425.16 (anti-SLAPP (Strategic Lawsuits Against Public Participation) statute); *see also* Ch. 11, *Preliminary Litigation Issues,* § 11.16 (SLAPP Suit Provisions).

complaint challenging the issuance of a conditional use permit.[32] Causes of action challenging the issuance or denial of a permit are based on decisions by the local government to grant or deny the permit; the claims do not arise from any statements, writings, or conduct in furtherance of the local government's rights to petition or speech and therefore do not come within the anti-SLAPP statute.[33]

For a complete discussion of judicial review and traditional administrative mandamus, see Chapter 12, *Judicial Review of Administrative Decisions*.

PRACTICE TIP: Making a Record. In most land use cases, whether under traditional mandamus or administrative mandamus, the court's review will be limited to the record made before the local agency. Therefore, the importance of making a record through written materials (applications, presentations, letters, etc.) and oral testimony cannot be overemphasized. Copies of materials presented at a hearing, such as slides or graphics, should be submitted for the record, along with resumes or credentials of any expert witnesses. Verbatim transcripts of hearings should be made, in some cases by ensuring that a court reporter attends the public hearing if the agency does not keep accurate video records or adequate recordings. The doctrine of exhaustion of administrative remedies also requires that you ensure that all applicable appeals are made and that all necessary issues are raised before the local agency before attempting a judicial challenge.[34]

PRACTICE TIP: Findings. In any quasi-judicial land use case, an agency must make written findings to support its decision. These findings are what the court will review to determine if the agency's decision is supported by its findings, and whether these findings are supported by the evidence in the record. It is important to review the draft findings prepared by agency staff, and where possible supplement these findings to ensure their legal adequacy. Emphasis should be placed both on ensuring the logical consistency of the findings in explaining the basis for the decision, and in ensuring that the findings contain detailed references to evidence presented at the hearing, in the staff report, in the application, or elsewhere in the record. The "Topanga" test should be met so that the findings "bridge the analytic gap between the raw evidence and the ultimate decision or order."

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[32] Shahbazian v. City of Rancho Palos Verdes (2017) 17 Cal. App. 5th 823, 225 Cal. Rptr. 3d 772.

[33] Shahbazian v. City of Rancho Palos Verdes (2017) 17 Cal. App. 5th 823, 835, 225 Cal. Rptr. 3d 772.

[34] For a complete discussion of the exhaustion doctrine, see Ch. 12, *Judicial Review of Administrative Decisions*.

[4] Burden of Proof

The challenging party ordinarily has the burden of proving that a zoning ordinance is not reasonably related to the public welfare.[35] There is an exception for actions challenging the validity of ordinances that (1) directly limit the number of residential building permits or buildable lots for residential purposes, or (2) change residential zoning so as to violate the requirement that the governing body zone sufficient vacant land for residential use to meet housing needs identified in the general plan.[36] In these cases, with certain important limitations,[37] the local government bears the burden of proof that the ordinance is necessary for the protection of the public health, safety, or welfare.[38] This exception has been held to apply to growth control measures adopted by initiative.[39]

With respect to quasi-judicial challenges, under the substantial evidence rule, the permit applicant bears the burden of demonstrating entitlement to the permit.[40]

§ 60.101 Limitation of Actions

[1] Purpose of Limitation; Commencement

Most land use challenges have very short statutes of limitations, generally set at 90 days. The Legislature has adopted shortened statutes of limitations applicable to actions challenging zoning decisions in an effort to provide certainty to both agencies and the public in the development process. Recent amendments make it clear that shortened limitations are also necessary to reduce delays in meeting the state's housing needs.[1]

PRACTICE TIP: Check for Shorter Local Limitation Periods. State-mandated statutes of limitations are often maximum periods. Cities and counties generally are free to adopt shorter periods of limitation.[2] Accordingly, be sure to consult local ordinances to see if such a shorter period has been adopted.

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[35] Associated Home Builders Etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 607–609, 135 Cal. Rptr. 41, 557 P.2d 473.

[36] Evid. Code § 669.5(a), (b); Gov. Code § 65913.1.

[37] *See* Evid. Code § 669.5(c), (d).

[38] Evid. Code § 669.5(b).

[39] Building Industry Assn. v. City of Camarillo (1986) 41 Cal. 3d 810, 820, 226 Cal. Rptr. 81, 718 P.2d 68.

[40] Hauser v. Ventura County Bd. of Supervisors (2018) 20 Cal. App. 5th 572, 576, 229 Cal. Rptr. 3d 159; BreakZone Billiards v. City of Torrance (2000) 81 Cal. App. 4th 1205, 1224, 97 Cal. Rptr. 2d 467.

[1] Gov. Code § 65009(a).

[2] *See, e.g.,* Gov. Code § 65009(g), discussed in § 60.101[2].

Usually the statutes governing a particular type of action specify the commencement of the period of limitation.[3] When no commencement is specified, the cause of action accrues at the time the legislative body makes a final discretionary decision.[4]

[2] Challenges to Adoption or Amendment of Zoning Ordinance

Under the terms of Gov. Code § 65009, any action challenging the adoption or amendment of a zoning ordinance must be commenced, and notice served on the legislative body, within 90 days after the legislative body's decision.[5] An action challenging a legislative body's decision to deny an application for a zone change is also subject to a 90-day limitation period.[6] An action or proceeding challenging ordinances concerning development of very low, low, or moderate income housing,[7] or to challenge the adequacy of an ordinance establishing density bonuses,[8] must be served within 180 days after the accrual of the cause of action.[9] These actions may not be maintained until 60 days have expired following notice to the city specifying the deficiencies in the zoning ordinance.[10]

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[3] For discussion of particular limitation periods, see § 60.101[2]–[5].

[4] *See, e.g.,* Soderling v. City of Santa Monica (1983) 142 Cal. App. 3d 501, 505, 191 Cal. Rptr. 140 (under local ordinance, final map approval was ministerial; therefore, cause of action accrued on approval of tentative map); Barbaccia v. County of Santa Clara (N.D. Cal. 1978) 451 F. Supp. 260, 266 (cause of action did not accrue when general plan was amended but when county denied plaintiff's development proposal).

[5] Gov. Code § 65009(c)(1)(B); *see* Freeman v. City of Beverly Hills (1994) 27 Cal. App. 4th 892, 896–897, 32 Cal. Rptr. 2d 731 (challenge to interim conditional use permit ordinance barred by Gov. Code § 65009(c)(2)); *but see* Arcadia Development Co. v. City of Morgan Hill (2008) 169 Cal. App. 4th 253, 268, 86 Cal. Rptr. 3d 598 (property owner's challenge asserting equal protection and takings claims based on 10-year extension of growth control ordinance was not barred by Gov. Code § 65009(c)(1); because original density limitation was intended to be temporary and circumstances had changed when extension of the density restriction was enacted, that extension of the restriction gave rise to new causes of action and lawsuit therefore was timely).

[6] Gov. Code § 65009(c)(1)(B); *see* General Development Co., L.P. v. City of Santa Maria (2012) 202 Cal. App. 4th 1391, 1395, 136 Cal. Rptr. 3d 490 (denial of rezoning application is a "decision" within meaning of Gov. Code § 65009(c)(1)(B)).

[7] *See* Gov. Code § 65863.6 (ordinance limiting number of housing units that may be constructed on annual basis); Gov. Code § 65913 et seq. (housing development approvals and incentives for very low, low, and moderate income housing).

[8] *See* Gov. Code § 65915.

[9] Gov. Code § 65009(d)(2)(C).

[10] Gov. Code § 65009(d)(3)(A). A cause of action accrues 60 days after the notice is filed or the legislative body takes a final action in response to the notice, whichever occurs first. Gov. Code § 65009(d)(3)(B). The notice may be filed at any time within 180 days after an action described in Gov. Code § 65009(d)(2)(C). In amending Gov. Code § 65009 in 2013 Cal. Stats., ch. 767 (AB 325), the Legislature declared its intent to modify the opinion in Urban Habitat Program v. City of Pleasanton (2008) 164 Cal. App. 4th 1561, 80 Cal. Rptr. 3d 300 with regard to the decision's interpretation of Gov. Code § 65009.

PRACTICE TIP: Remember to Consider the CEQA Limitation Period. Generally, a land use cause of action will be combined with a cause of action under CEQA to cover all potential claims. The limitation period under CEQA is generally shorter—on a Notice of Decision and Notice of Exemption, 30 and 35 days, respectively.[11] Therefore, the land use cause of action's limitation period is not going to be controlling. Be sure to consider CEQA claims and CEQA limitations periods in any land use case.

[3] Challenges to Consistency of Zoning Ordinance With General Plan

Actions to enforce the requirement of Gov. Code § 65860(a) that zoning ordinances be consistent with the general plan must be commenced and service made on the legislative body within 90 days of the enactment or amendment of the challenged zoning ordinance.[12] The statute of limitations applies to zoning ordinances or amendments enacted by the voters as well as to those enacted by legislative bodies.[13] Although the statute does not explicitly provide for shorter periods of limitation, a 30-day local period of limitation has been upheld on the grounds that it was not preempted by state law.[14]

[4] Challenges to Conditional Use Permits and Variances

Except as otherwise provided under local ordinance, an action challenging a decision on a variance or a conditional use or other permit, the conditions attached to such a decision, or an appeal from such a decision, must be brought within 90 days of the decision.[15]

This period of limitation has been held not to apply to a board of supervisors' order terminating a nonconforming use because the order was not an action of the planning commission or of the board of supervisors in its appellate capacity, and therefore was not a type of action covered by Gov. Code § 65009(c)(1)(E).[16] In another case, the 90-day limitation period was held to apply to an action challenging a decision of a city

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[11] *See* Ch. 20, *Background and Implementation of CEQA*.

[12] Gov. Code § 65860(b); Pan Pacific Properties, Inc. v. County of Santa Cruz (1978) 81 Cal. App. 3d 244, 253, 146 Cal. Rptr. 428.

[13] Lee v. City of Monterey Park (1985) 173 Cal. App. 3d 798, 810, 219 Cal. Rptr. 309.

[14] Pan Pacific Properties, Inc. v. County of Santa Cruz (1978) 81 Cal. App. 3d 244, 252–253, 146 Cal. Rptr. 428.

[15] Gov. Code § 65009(c)(1)(E); Hawkins v. County of Marin (1976) 54 Cal. App. 3d 586, 592, 126 Cal. Rptr. 754 (challenge to conditional use permit barred); Concerned Citizens of Palm Desert, Inc. v. Board of Supervisors (1974) 38 Cal. App. 3d 257, 264–265, 113 Cal. Rptr. 328 (challenge to conditional use permit and variance barred); *see* Ching v. San Francisco Bd. of Permit Appeals (1998) 60 Cal. App. 4th 888, 891, 70 Cal. Rptr. 2d 700 (90-day limitation period applied to Political Reform Act challenge to decision granting conditional use permit).

[16] People v. Gates (1974) 41 Cal. App. 3d 590, 598, 116 Cal. Rptr. 172.

planning department issuing a building permit. Gov. Code § 65009 applied because the writ petition challenged a building permit issued in conjunction with a zoning variance, and the gravamen of the petition was that the variance was improperly granted.[17]

An action seeking removal of conditions imposed by ordinance on a building permit was timely under Gov. Code § 65009(c)(1)(E) even though the plaintiff raised a facial rather than an as-applied challenge to the ordinance more than 90 days after the ordinance was adopted. The action was timely because it was brought within 90 days of the final decision imposing the conditions.[18]

A letter from the director of the city community development department to the developer of a commercial project constituted approval of the project triggering the 90-day limitations under Gov. Code § 65009(c)(1)(E).[19] Although Gov. Code § 65009(c)(1) generally provides that the 90-day limitations period applies to decisions of legislative bodies, Gov. Code § 65009(c)(1)(E) includes "any decision" on the matters listed in Gov. Code § 65901, a group that includes a zoning administrator's exercise of any powers granted by local ordinance.[20] Because the director was acting as the city's zoning administrator and was exercising powers granted by local ordinance, section 65009(c)(1)(E) was applicable.[21]

A request for preparation of the administrative record pursuant to Code Civ. Proc. § 1094.6(d)[22] did not extend the 90-day limitations period for challenging a variance set forth in Gov. Code § 65009(c).[23] Code Civ. Proc. § 1094.6 applies more generally to challenges to local agency decisions concerning such subjects as the revocation of permits and licenses, adverse employment decisions, and the imposition of administrative penalties,[24] while Gov. Code § 65009 applies more specifically to the challenge to the variance decision. Therefore, section 65009, as the more specific statute, controls.[25]

A challenge to a city's agreement with a utility for the removal of trees was not served on either the city or the utility within the 90-day period for filing and service

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[17] Honig v. San Francisco Planning Dept. (2005) 127 Cal. App. 4th 520, 528, 25 Cal. Rptr. 3d 649.

[18] Travis v. County of Santa Cruz (2004) 33 Cal. 4th 757, 767, 16 Cal. Rptr. 3d 404, 94 P.3d 538.

[19] Stockton Citizens for Sensible Planning v. City of Stockton (2012) 210 Cal. App. 4th 1484, 1498, 149 Cal. Rptr. 3d 222.

[20] Stockton Citizens for Sensible Planning v. City of Stockton (2012) 210 Cal. App. 4th 1484, 1495–1496, 149 Cal. Rptr. 3d 222.

[21] Stockton Citizens for Sensible Planning v. City of Stockton (2012) 210 Cal. App. 4th 1484, 1498–1499,149 Cal. Rptr. 3d 222 (cause of action for planning and zoning violations sought "to attack, review, set aside, void, or annul" director's approval of the project and was time-barred under Gov. Code § 65009(c)(1)(E)).

[22] Code Civ. Proc. § 1094.6(d) provides that a timely request to a local agency for preparation of the administrative record extends the limitations period to the 30th day following delivery of the record.

[23] Okasaki v. City of Elk Grove (2012) 203 Cal. App. 4th 1043, 1049, 137 Cal. Rptr. 3d 873.

[24] Code Civ. Proc. § 1094.6(e).

[25] Okasaki v. City of Elk Grove (2012) 203 Cal. App. 4th 1043, 1049, 137 Cal. Rptr. 3d 873.

required by Gov. Code § 65009(c)(1)(E) and, therefore, was not timely under section 65009. The "agreement" was treated as a "decision" for purposes of applying section 65009.[26] However, the plaintiffs' challenge under the California Environmental Quality Act ("CEQA")[27] was timely filed and served pursuant to Pub. Res. Code §§ 21167 and 21167.6. Accordingly, the plaintiff's CEQA claims were preserved, while the Government Code claims were barred.[28]

[5] Administrative Mandamus Limitations

Petitions for judicial review of the quasi-judicial decisions of local agencies brought under Code Civ. Proc. § 1094.5 must be filed no later than 90 days following the date on which the decision becomes final.[29] The local agency must provide notice to the party that the time within which judicial review must be sought is governed by Code Civ. Proc. § 1094.6.[30] The 90-day period may be tolled if the public agency fails to give such notice.[31]

[6] Laches

Independent of statutes of limitations, the equitable defense of laches can bar an untimely action if there has been an unreasonable delay in bringing suit coupled with prejudice to the defendant.[32] Challenges to both zoning enactments and the enforcement of zoning ordinances have been found to be barred by laches.[33]

§ 60.102 Technical or Procedural Errors

No action, inaction, or recommendation of a public agency or its legislative body regarding zoning may be set aside on the basis of a procedural error or irregularity unless the error or irregularity is prejudicial. To establish prejudice, the complaining

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[26] Save Lafayette Trees v. City of Lafayette (2019) 32 Cal. App. 5th 148, 156, 243 Cal. Rptr. 3d 636.

[27] Pub. Res. Code § 21000 et seq.

[28] Save Lafayette Trees v. City of Lafayette (2019) 32 Cal. App. 5th 148, 160, 243 Cal. Rptr. 3d 636; Pub. Res. Code §§ 21167(a) (action "alleging that a public agency is carrying out or has approved a project that may have a significant effect on the environment without having determined whether the project may have a significant effect on the environment shall be commenced within 180 days from the date of the public agency's decision to carry out or approve the project," 21167.6(a) (complaint or petition "shall be served personally upon the public agency not later than 10 business days from the date that the action or proceeding was filed")).

[29] Code Civ. Proc. § 1094.6(b) (specifying when agency decisions become final).

[30] Code Civ. Proc. § 1094.6(f).

[31] El Dorado Palm Springs, Ltd. v. Rent Review Com. (1991) 230 Cal. App. 3d 335, 346, 281 Cal. Rptr. 327 (limitations period tolled); Cummings v. City of Vernon (1989) 214 Cal. App. 3d 919, 921, 263 Cal. Rptr. 97 (agency decision is not final until notice given).

[32] City and County of San Francisco v. Pacello (1978) 85 Cal. App. 3d 637, 644, 149 Cal. Rptr. 705; People v. Department of Housing & Community Dev. (1975) 45 Cal. App. 3d 185, 195, 119 Cal. Rptr. 266.

[33] *See, e.g.,* People v. Department of Housing & Community Dev. (1975) 45 Cal. App. 3d 185, 200, 119 Cal. Rptr. 266 (attempt to apply CEQA to mobile home project after issuance of all necessary permits barred); Concerned Citizens of Palm Desert, Inc. v. Board of Supervisors (1974) 38 Cal. App. 3d 257, 265, 113 Cal. Rptr. 328 (attack on conditional use permit and variance barred).

party must prove substantial injury and that a different result would have been probable.[1] The matters within the scope of this provision include petitions, applications, notices, findings, records, hearings, reports, recommendations, appeals, all matters of procedure, and the improper admission or rejection of any evidence.[2]

§ 60.103 Resolution by Mediation

State law now encourages any legal action involving a land use dispute to be resolved through alternative dispute resolution. Any action involving, among other things, a public agency's approval or denial of a development project, the adequacy of a general or specific plan,[1] or the validity of a zoning decision, may be resolved by mediation.[2] The process may be initiated by invitation from the court within five days after the deadline for the respondent or defendant to file a response to the action.[3] If the parties accept the court's invitation to mediate the dispute, a mediator will be chosen according to prescribed procedures, and all time limits with respect to the underlying action will be tolled.[4] If they do not accept the court's invitation or if they cannot agree on a mediator, the action will proceed. The court is not permitted to draw any implication from either party's refusal to mediate.[5] If the mediation does not resolve the action, the court has discretion to schedule a settlement conference. If the action is subsequently tried on its merits, the same judge who presided at the conference will preside at trial.[6]

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[1] Gov. Code § 65010(b); *see* Hayssen v. Board of Zoning Adjustments of Sonoma (1985) 171 Cal. App. 3d 400, 408, 217 Cal. Rptr. 464, *cert. denied*, 476 U.S. 1114, 106 S. Ct. 1969, 90 L. Ed. 2d 653 (1986) (no prejudice from use of incorrect street name in property description published in notice of conditional use permit hearing when appellants had actual and constructive notice of development project).

[2] Gov. Code § 65010(b).

[1] *See* Gov. Code § 65100 et seq.

[2] Gov. Code § 66031(a)(1), (6), (9).

[3] Gov. Code § 66031(b).

[4] Gov. Code §§ 66031(c), 66032(a).

[5] Gov. Code § 66031(d).

[6] Gov. Code § 66034.