

**Sierra Club Angeles Chapter Conservation Legal
Committee and Loyola Law School Environmental
Law Society's Land Use and Global Warming
Workshop for Environmental Activists**

Land Use, CEQA and NEPA

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GENERAL PLANS

- A general plan is the constitution for all future development in cities and counties. It contains the city or county's development policies, objectives and goals.
- A legally adequate general plan must be comprehensive, long-term, and internally consistent, and must contain mandatory elements, and each mandatory element must meet the state law criteria set out for it.
- Mandatory elements for general plans include: land use; circulation; housing; conservation; open space; noise; and safety. (Government Code § 65302.)
- Approvals relying on an inadequate general plan are inadequate.
- All other land use approvals must be consistent with the general plan. Charter cities (except LA) are exempt from the requirement that zoning be consistent with the general, unless the charter requires consistency.
- Cities and counties have substantial discretion in interpreting their own general plans and determining consistency. The less specific the policy, the more discretion the city or county has in determining consistency.
- Courts have found a project to be inconsistent with the general plan if it conflicts with a general plan policy that is "fundamental, mandatory, and specific."
- Cities and counties can adopt amendments to general plans by resolution.
- Amendment of regional policies should not be done on a case-by-case basis.
- Due to the importance of the general plan, be aware of any general plan amendments and updates. Public hearings must be held on the adoption or amendment of a general plan. These amendments are reviewed under CEQA, which also provides a good opportunity for public comment.
- General plan litigation can be brought for: inconsistency with other planning documents; internal inconsistency; lack of compliance with state laws governing general plans; and inadequacy of the environmental review document prepared for the general plan.
- You must exhaust your administrative remedies to bring these types of litigation.

- You must submit the factual and legal issues to the city before it approves the project to bring those issues in a lawsuit.
- You must also appeal the cities decision to the highest available decision making body. If a planning commission approves a project and there is an available appeal to the city council, you must make that appeal before bringing litigation.
- There is a 90 statute of limitations for filing litigation and serving the city or county.
- The adoption of a general plan or general plan amendment is a legislative action, so a referendum can also be brought to overturn the adoption.

SPECIFIC PLAN

- Specific plans are used to implement the general plan in particular areas of the city or county.
- A specific plan must be consistent with the general plan.
- A community plan is part of the general plan that applies to a certain area of the city or county.

ZONING

- Zoning divides cities and counties into different land use districts and defines regulations (such as density, building heights, setbacks) for each type of land use district (residential, commercial, industrial).
- Zoning ordinances must be reasonably related to the public interest.
- Zoning must be consistent with general plan.
- If there is not a valid general plan or the general plan is missing required elements, then zoning ordinance cannot be enacted. However, zoning laws do not apply to charter cities unless those cities have specifically adopted the zoning laws. LA is excluded from this exception.
- Zoning ordinances can only be adopted after public notice and hearing.
- Zoning ordinances can be adopted by initiative or overruled by referendum, but an initiative or referendum cannot create inconsistency with general plan.
- Property owners may seek relief from strict compliance with the entire zoning ordinance through the use of a variance or a conditional use permit (“CUP”).
- A variance allows the construction of a structure that would not otherwise be allowed under the zoning ordinance.
 - To obtain a variance, a property owner must show that she or he would suffer a hardship if required to comply with the zoning ordinance and that the hardship is related to a unique aspect of the property that makes it different from other properties.
 - The land use designation of a property cannot be changed by a variance.

- A variance cannot adversely affect the public interest or nearby property owners.
- A CUP also provides relief from strict compliance with the zoning ordinance.
 - Cities and counties generally provide a list of uses specifically allowed in each zone and others uses that require a CUP.
 - Each local government determines the criteria under which a CUP is permitted.

SUBDIVISION MAP ACT

- The Subdivision Map Act gives cities and counties the power to regulate and control the design and improvement of subdivisions within its boundaries through the approval of tentative, final and parcel maps.
- A subdivision divides a piece of land into smaller units for sale or lease.
- A parcel map is used when the land is divided into four or fewer parcels.
- When there will be five or more parcels or units (such as in a condominium building) after subdivision, a tentative and final map are required.
- A tentative map is required before a final map. Tentative maps have a two year life span, but can be extended by the city or by certain circumstances.
- A city or county may impose conditions upon parcel and tentative maps. These conditions can include fees and other mitigation measures for impacts the development would cause.
- A developer can pursue either a tentative or vesting tentative map.
 - A tentative map that is not vesting will be required to comply with ordinances passed after the application was approved.
 - A vesting tentative map gives the developer the right to proceed with a development that is in substantial compliance with the ordinances and other city policies in effect at the time the application for approval was completed. Vesting tentative maps generally require the inclusion of additional information.
 - Future discretionary approvals needed for the project after a vesting tentative tract are not automatically granted, but are reviewed under the ordinances, polices and standards in effect at the time the vesting tentative tract map application was complete.
- Subdivision maps must be consistent with the general plan.
- If a subdivision map is approved by an advisory agency, any person adversely affected may file an appeal of the map approval with the city council or elected body. (Government Code § 66452.5(d).)
- A developer must file the final map before the tentative map expires. When the tentative map expires, all proceedings under that map are terminated and a new map and approval process must be initiated.
- Approval of the final map is ministerial if it substantially complies with the tentative map and no new conditions can be applied.

- Before seeking judicial relief from the approval of a subdivision map, you must exhaust your administrative remedies.
- There is a 90 day statute of limitations for filing litigation under the Subdivision Map Act and serving the local agency.
- Subdivision map approvals are not subject to referendum.

Development Agreement

- A development agreement is a negotiated agreement with the city for development. Because it is a negotiated agreement, a city can put additional restrictions on a development that are part of the agreement if the developer will agree to them.
- A development agreement locks in the ordinances in effect at the time it is executed.
- Development agreements are subject to referendum.
- There is a 90 day statute of limitations to challenge adoption, amendment or modification of a development agreement.
- A development agreement can have a longer life than a subdivision map. The agreement should set out terms for the extension of the agreement.

EMINENT DOMAIN

- Eminent domain is used by redevelopment agencies to acquire land for redevelopment projects.
- Redevelopment is intended to revitalize struggling neighborhoods, but has been used more sweepingly.
- Redevelopment areas of a city are designated after they have been classified as blighted. Blighted areas are areas that: are predominately urban; where blight conditions are prevalent and substantial; and where blight conditions cause both a physical and economic burden to the community.
- Areas of the city designated for redevelopment can then be taken by the redevelopment agency through eminent domain if the owner of the land is unwilling to sell to the city.
- Eminent domain powers can be used for schools, roads, and other publicly owned projects. Recent cases have found that eminent domain also may be used to assist a public purpose even if the land ultimately ends up in private ownership.

CALIFORNIA ENVIRONMENTAL QUALITY ACT

- CEQA (Public Resources Code §§21000, et seq.) requires agencies to consider the environmental impacts of a proposed project. It is intended to assist governmental decision makers in making informed decisions regarding those impacts, and to consider mitigation measures and alternatives.
- CEQA applies to discretionary projects. A discretionary project is one that requires an agency to exercise judgment in approving or disapproving it.

- CEQA applies to the whole of the action when any part of a project is discretionary.
- The Resources Agency has developed a list of activities that are presumed to not have a significant impact on the environment. These categorical exemptions to CEQA are listed in the CEQA Guidelines. (14 CCR 15300.) If the lead agency determines that a categorical exemption applies, they file a notice of exemption.
- The initial study describes the environmental setting and project's impacts (potentially significant, less than significant with mitigation). It is used to determine whether a negative declaration, mitigated negative declaration ("MND") or environmental impact report ("EIR") should be prepared.
- A negative declaration is adopted when there is no substantial evidence (facts, reasonable assumptions and expert opinion based on facts) supporting a "fair argument" that a project may have a significant environmental impact.
- An MND is adopted when a project may have significant environmental impacts, but certain mitigation measures clearly reduce impacts below a level of significance.
- An EIR is prepared when there is a "fair argument" that project may have significant environmental impacts despite imposition of mitigation measures, even if a different conclusion is well-supported. The EIR describes the project, objectives, environmental setting, analyzes potential impacts, and examines feasible alternatives and mitigation measures.
- EIRs must examine a reasonable range of alternatives to project or its location; feasible alternatives obtain most of basic project objectives but avoid or substantially decrease significant impacts; alternatives may be feasible even if more costly or less profitable.
- When an agency decides to prepare an EIR, it files a notice of intent. This begins a scoping comment period.
- A Draft EIR is prepared first and then circulated for public comment for at least 30 days.
- A Final EIR is then prepared, taking into consideration the comments submitted by the public and agencies. A Final EIR must include written responses to comments on and revisions to the Draft EIR.
- The lead agency must certify the Final EIR (after it has reviewed and considered the document) before the project can be approved.
- A notice of determination is filed after the CEQA document is adopted or certified.
- An agency cannot approve a project if feasible alternatives and/or mitigation measures are available that would substantially lessen the project's significant environmental impacts. A statement of overriding considerations, for impacts found to be significant and unavoidable in an EIR, must be supported by substantial evidence in the record.

- Anyone that would be affected by the impacts of a project can bring an action under CEQA if they have exhausted their administrative remedies.
- To exhaust, must have objected to the project before it was approved and can only sue for violations that were presented to the agency before project approval.
- Must sue the approving agencies and any real parties in interest.
- CEQA has short statute of limitations for bringing action:
 - 35 days after a notice of exemption;
 - 30 days after notice of determination;
 - If neither are filed, 180 days from the project approval.
- You must request a hearing date within 90 days of filing petition.
- Filing an action does not stop the project, may need to seek a stay order, temporary restraining order, preliminary injunction.
- The administrative record is generally the only evidence in a CEQA action so get as much solid evidence in as possible during the administrative review of the project. Sources for evidence:
 - expert reports (experts in neighborhood, university professors);
 - photographs;
 - personal observations;
 - internet research;
 - detailed descriptions of feasible alternatives.
- Possible results of litigation: settlement, petition denied, writ issued & project approval rescinded.
- Cost of litigation: filing fees, administrative record, miscellaneous costs, attorneys' fees could be awarded if petitioner wins.

NATIONAL ENVIRONMENTAL POLICY ACT

- NEPA (42 U.S.C. § 4321, et seq.) is also intended as a procedural tool to allow federal agencies to consider the environmental impacts of a proposed action and assist decision makers in making informed decisions regarding those impacts.
- Federal agencies each have their own regulations regarding the procedures to be used in the NEPA process.
- NEPA applies only to discretionary actions that a federal agency intends to carry out, fund or approve.
- Certain activities that fall within NEPA's requirements have been exempted from review by Congress.
- NEPA contains a list of actions that are categorically excluded from review. If an exclusion applies, it is documented for the record. (40 CFR § 1508.4: list of categorical exclusions)
- A categorical exclusion cannot be used if "extraordinary circumstances in which a normally excluded action may have a significant environmental effect." (e.g. the presence of an endangered species.)

- If the action is not exempt and no categorical exclusion is applicable, an EA is prepared.
- An environmental assessment (“EA”) is a preliminary assessment used to determine if the proposed federal action would significantly affect the quality of the human environment.
- Contents of an EA: need for the proposed action; alternatives; probable environmental impacts of action and alternatives; agencies and persons consulted during preparation.
- NEPA states that the public should be involved in the preparation of an EA whenever possible, federal agencies often have specific regulations on public involvement.
- Federal agencies must provide public notice of the availability of an EA. This allows the public to comment on the findings of the EA and submit evidence of additional impacts or other alternatives.
- If the EA shows that the action would not have a significant impact on the environment or any impact it could have would be mitigated, a finding of no significant impact (“FONSI”) or mitigated FONSI is prepared.
- Federal agencies must also provide public notice of the availability of a FONSI according to their own regulations.
- When the action is an unusual case, one in which an EIS is often required, controversial, or a borderline case, the FONSI must be made available for public review 30 days before the agency makes its final decision. This allows time for the public to submit additional evidence that the agency can use in making its final decision.
- An EIS is required when there is a "major federal action significantly affecting the quality of the human environment." (42 U.S.C. § 4332(2)(C).)
- When an EIS is to be prepared, a notice of intent is published in the Federal Register. This notice will include a description of the action, possible alternatives, time and place of scoping meetings, and lead agency contact information.
- The scoping period is when the agency considers the extent of the action, range of alternatives and types of impacts. Scoping meetings are an opportunity for the public to provide input on these considerations.
- After scoping is completed, a Draft EIS is prepared. Public notice of the availability of the Draft EIS must be provided to those who have requested it for an action.
- A public hearing is usually conducted on the Draft EIS. The Draft EIS is circulated for public comments (generally 45 days). Comments should focus on whether the Draft EIS sufficiently identifies and analyzes the impacts of the action and alternatives or mitigation measures that would reduce the actions impacts. Specific evidence, such as facts, expert reports and data can serve as substantial evidence. Expanding upon comments from other agencies can also be useful.

- If you do not comment throughout the NEPA process, you will not have exhausted your administrative remedies and therefore will likely not be able to bring litigation.
- The Final EIS contains a response to all comments the agency received on the Draft EIS and discusses any opposing views. The Final EIS is circulated for 30 days prior to the agencies final decision on the action.
- After the agency determines the EIS meets NEPA's requirements, it adopts it. After adopting the EIS, the agency makes a decision on the proposed action. After adopting the EIS, a ROD is prepared. A ROD is a written public record explaining why the agency has taken a particular course of action.
- NEPA litigation can be brought by citizens or groups that would be injured by the action and that have exhausted their administrative remedies.
- NEPA has no statute of limitations, though certain acts, like the Federal Transportation Act, contain statutes of limitations within them. Otherwise, the six year federal statute of limitations or laches can be argued if an action is not quickly brought.
- NEPA litigation, like CEQA, is based on the administrative record for the action, making it very important for those objecting to the project to get as much specific and reliable information as possible into the record during the EIS/EA preparation.

REFERENCES

Cases and Codes: <http://www.findlaw.com/casecode/>

CERES website of the California Resources Agency: <http://ceres.ca.gov/ceqa> and <http://ceres.ca.gov/planning>

Governor's Office of Planning and Research (OPR) : www.opr.ca.gov

CEQA Net: www.ceqanet.ca.gov

Council on Environmental Quality's NEPA Guide:
www.nepa.gov/nepa/Citizens_Guide_Dec07.pdf

Federal Register: <http://www.gpoaccess.gov/fr/index.html>