

California Real Property Journal

OFFICIAL PUBLICATION OF THE REAL PROPERTY LAW SECTION

STATE BAR OF CALIFORNIA

Vol. 27, No. 2, 2009

www.calbar.ca.gov/rpsection

Special "Green Issue" Introductory Letter	3
By Scott D. Rogers and Julie Baird	
CEQA and Climate Change—Where Are We Today and Where Are We Going?	4
By Michael H. Zischke and Sarah E. Owsowitz	
<i>This article reviews current laws, regulations and trial court decisions which address the treatment of climate change in CEQA documents and discusses practical strategies for practitioners to pursue when evaluating climate change in CEQA documents.</i>	
Who Pays The Costs of Green Building Laws?	15
By Byron F. Mellberg	
<i>This article takes a green building perspective on two opposing California Supreme Court opinions that dealt squarely with the issue of who pays for government mandated building costs under identical compliance with laws provisions.</i>	
Turning Brown into Green: Practical Considerations for Lenders and Buyers of Contaminated Property in a Red Economy	20
By Deborah K. Tellier, John J. Gregory, and Mathew J. Swain	
<i>This article discusses potential environmental cleanup liabilities facing lenders and prospective purchasers of Brownfields sites and the legal protections available to them, as well as provides practical tips for successfully redeveloping Brownfields sites.</i>	
MCLE Test No. 16	31
Renewable Energy Development on Williamson Act Property: Reconciling California's Competing Policy Goals	33
By Dirk R. Mueller and Takako Morita	
<i>This article explores the feasibility of developing wind and solar energy projects on agricultural and open space land subject to Williamson Act land use restrictions.</i>	
Adapting Planning and Environmental Approaches to Meet the Challenges of an Urban Residential Mixed-Use Strategy for Smart Growth	40
By Jessica A. Johnson and Daniel P. Bane	
<i>Smart growth planning approaches can achieve the greenhouse reduction goals of AB 32 and SB 375. Mixed-use plans are risky; however, the risk can be reduced by undertaking programmatic environmental review of the mixed-use plan.</i>	
Revised Solar Shade Control Act: Trees versus Solar Energy	48
By Teresa Buchheit Klinkner	
<i>This article examines the 2008 amendments to the Solar Shade Control Act, a previously obscure solar access law that gained notoriety after a neighbor dispute resulted in a criminal judgment in northern California.</i>	
Enforcement of Local Green Building Ordinances Integrating Third-Party Rating Systems	54
By Stephen R. Miller	
<i>This article reviews local governments' implementation and enforcement mechanisms for ensuring compliance with third party green building rating systems—such as LEED or GreenPoint Rated—when integrating such rating systems into local codes.</i>	

**DISTRIBUTED AT NO EXTRA CHARGE TO MEMBERS OF
THE REAL PROPERTY LAW SECTION OF THE STATE BAR OF CALIFORNIA**

The statements and opinions herein are those of the contributors and not necessarily those of the State Bar of California, the Real Property Law Section, or any government body.

Adapting Planning and Environmental Approaches to Meet the Challenges of an Urban Residential Mixed-Use Strategy for Smart Growth

By Jessica A. Johnson and Daniel P. Bane

©2009 All Rights Reserved.

I. INTRODUCTION

If men could learn from history, what lessons it might teach us! But passion and party blind our eyes, and the light which experience gives us is a lantern on the stern which shines only on the waves behind.

- Samuel Taylor Coleridge

Prior to the early twentieth century, development occurred with minimal governmental oversight. Cities¹ were characterized by a mix of uses in a single area, where buildings housed both residences and businesses, and neighborhoods hosted a variety of uses. As industry expanded and population grew, conflicts between the industrial and residential uses arose. The toxic fumes, dirt, and noise of industrial operations were undesirable to and negatively impacted residential occupation. As a result, cities began to create long-term, community-wide plans to regulate the location and types of land uses in a manner that facilitated a better quality of life. With this revolution, modern comprehensive planning was born.

To resolve and avoid conflicts between uses, cities abandoned mixed-use development and, instead, promoted the separation of land uses into single-use districts.² Accordingly, uses were compartmentalized and housing was located in one part of the city, while shops and businesses were located in another. For the past century, this single-use approach, known as Euclidian zoning, has been the dominant strategy in planning urban areas.³ As population has increased, however, the prevailing planning strategy is now shifting to mixed-use as a “smart growth” strategy to conserve natural resources and reduce environmental impacts such as climate change.

This article first gives the reader a background into the planning movement from Euclidian zoning to smart growth and then explains how environmental concerns have increased the demand for smart growth strategies, including mixed-use. The challenges of creating a mixed-use district by introducing residential infill into existing urban commercial/industrial areas is discussed followed by the suggestions for methods to plan a sustainable mixed-use community. Finally, this article encourages using a programmatic approach to conduct environmental review of urban residential mixed-use plans.

II. BACKGROUND: FROM EUCLIDIAN ZONING TO SMART GROWTH

Proper planning for future urban growth is important not only to the local government but also to developers. As cities are charged to act in the best interests of the health, safety, and welfare of their citizens, it is in a city’s interest to ensure that new development is comprehensively planned and environmentally studied. Developers also have an interest in the city’s plans for

growth because their projects will have greater success if they are located in areas that offer sufficient amenities to provide residents with a quality standard of living. Further, developers may be able to reduce the extensiveness of their own project’s environmental review if they can rely on a thorough environmental review of the city’s plan. On the other hand, if planning or environmental review is inadequate, both cities and developers risk legal challenge to their projects.

A. Introduction to Planning and Zoning

“Planning” is a general term for a city’s goals, objectives, and policies for the development of land.⁴ Those goals, objectives, and policies are set forth in a city’s General Plan.⁵ “Zoning” implements a city’s General Plan by creating specific regulations applicable to development within a designated area of the city.⁶ Generally, zoning divides a city into planning areas to foster the growth of a certain function and/or character in such areas, and the standards for development in each planning area are tailored to further the creation or maintenance of the city’s specific goals.⁷ A city’s zoning code typically consists of two types of regulations: (i) development standards, such as building height/bulk and setbacks;⁸ and (ii) land use regulations for the types of uses permitted, prohibited, or conditionally permitted.⁹

B. Traditional Euclidian Zoning Separates Uses

“Euclidian zoning” is the concept of segregating single types of permitted and conditionally permitted uses into separate districts.¹⁰ For example, adjacent to one another may be an exclusively residential district, a commercial district, and an industrial district. This form of use-based zoning is named after the seminal case of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (hereinafter, *Euclid*).

In the 1920s, Euclid was its own municipality but was effectively a suburb of Cleveland, Ohio.¹¹ The industrial development of Cleveland had expanded to the border, and somewhat into the village of Euclid.¹² In order to protect the residents of Euclid from industrial encroachment, the village council passed an ordinance prohibiting industrial development except where permitted in certain designated or defined areas.¹³ The ordinance divided the entire area of the village into six classes of use districts. Three classes consisted of height districts and four classes consisted of area districts.¹⁴

In *Euclid*, an owner of a 68-acre tract of land adjoining a residential neighborhood sued the village to invalidate the ordinance because the ordinance divided his land into three different zones and prescribed varying uses of his land within each zone.¹⁵ The owner argued that “the ordinance attempts to restrict and control the lawful uses of [his] land, so as to confiscate and

destroy a great part of its value.”¹⁶ The United States Supreme Court reviewed the decisions of the state courts and found that there was a reasonable rationale for regulating local land use and zoning. The Court found that there was a direct relationship between zoning and the health, safety, and welfare of the public.¹⁷ The Court further found that the implementation of zoning ordinances in city planning and land use had a positive effect on the following: (i) facilitation of police and fire protection; (ii) efficient use and maintenance of infrastructure; (iii) prevention of congestion and enforcement of traffic laws; (iv) reduction of noise impacts to residents; and (v) creation of a safer and more favorable environment in which to rear children.¹⁸

This Euclidian approach to local land use planning was the most common method of zoning throughout the twentieth century.¹⁹ Critics of Euclidian zoning, however, assert that the spatial separation of land uses inherent in use-based zoning “consum[es] excessive quantities of land,” creates urban sprawl,²⁰ and necessitates reliance on vehicular travel to complete daily activities.²¹ As population has become denser and air pollution more severe in recent decades, urban planners are turning to alternative methods of zoning to ensure sustainable growth.

C. Smart Growth Strategies Encourage Proximity of Uses

To meet the demands of growing populations without furthering urban sprawl, city planners and developers are turning to smart growth strategies. “Smart growth” is a term generally used to describe planning approaches to growth management that seek to balance the development of employment and housing opportunities within existing infrastructure and public services.²² Planning approaches such as mixed-use, transit-oriented development, and new urbanism are considered smart growth strategies.²³

1. Mixed-Use

In contrast to Euclidian zoning, mixed-used zoning permits multiple types of land uses within a single zoning district.²⁴ For example, in a mixed-use zoning district, the construction and development of a residential apartment building may be permitted on a lot located between an office building and a restaurant, allowing both residential and commercial uses to co-exist in one area. Mixed-uses may also be allowed within a single development project, such as a building with flower and coffee shops on the ground floor and apartments or offices on the floors above. Mixed-use districts or zones are typically created either by amending the zoning ordinances of existing commercial districts to allow residential uses or by creating a residential overlay zone.²⁵

2. Transit-Oriented Development Zones

Transit-oriented development zones are created to maximize pedestrian access to public transportation.²⁶ With this type of smart growth strategy, high-density residential or commercial development is zoned for development around a central transit station, with lower densities progressively spreading outwards.²⁷ For example, a rail station may be immediately surrounded by multi-storied commercial and residential buildings, transition-

ing to single family residential and industrial facilities located farther out from the center of the city.²⁸

3. New Urbanism

“New urbanism” is the concept of creating pedestrian-friendly metropolitan areas that contain a mix of uses, discernable town centers, and public spaces within a cohesive community.²⁹ Some of the key elements of new urbanism are: (i) the creation of urban neighborhoods where the activities of daily living and access to alternative modes of transportation are within walking distance; (ii) development at appropriate densities to prevent urban sprawl and to decrease reliance on automobiles; (iii) housing opportunities for all socio-economic levels; (iv) placement of parks and open public spaces throughout the urban area; and (v) the creation of graphic architectural and landscape design codes that define communities, public spaces, and streets.³⁰

III. ENVIRONMENTAL CONCERNS INCREASE DEMAND FOR SMART GROWTH

As reducing excessive human impacts on the environment has become an American priority, smart growth has emerged as a major movement in twenty-first century urban planning.³¹ The creation of a mixed-use district that puts everyday uses like a convenience store, drycleaner, and salon within walking distance of the home and office decreases the negative externalities of using automobiles, e.g., traffic congestion and air pollution.³² As a result, the mixed-use approach to smart growth is experiencing a vigorous revival in American metropolitan areas.³³

In California, not only has smart growth become a good planning strategy, but it is now also encouraged by the law. The California Global Warming Solutions Act of 2006 (“AB 32”) requires that the State Air Resources Board adopt regulations that will reduce greenhouse gas (“GhG”) emissions to 1990 levels by 2020.³⁴ AB 32 primarily addresses source emissions from automobiles by improving technology.³⁵ That alone, however, is not enough to fulfill AB 32’s GhG reduction goals.³⁶ To target the patterns of human activity that lead to the use of automobiles, in 2008, California adopted Senate Bill 375 (“SB 375”).³⁷

SB 375 promotes significant changes in regional land use and transportation planning to further the GhG reduction goals of AB 32.³⁸ One of SB 375’s strategies is to promote more compact land use to reduce the frequency and distance of trips made by automobiles.³⁹ SB 375 seeks to redirect population growth to high density, mixed-use developments that are located around mass transit hubs.⁴⁰ As with transit-oriented development, mixed-use development encourages people to drive less, and, in theory, reduces GhG emissions.⁴¹

SB 375 calls for action on the part of city planners and developers to implement these changes in land use patterns.⁴² In return, SB 375 provides certain incentives to developers to build mixed-use projects, such as relaxed environmental review and affordable housing benefits.⁴³ SB 375 also provides public agencies with funding incentives to build or improve mass transportation systems.⁴⁴

Given the objectives of SB 375 described above, the bill seems to directly oppose Euclidian zoning and urban sprawl, instead promoting smart growth zoning strategies. As such, smart growth, particularly mixed-use development, is gaining popularity as the alternative to Euclidian zoning.

IV. THE CHALLENGES OF CREATING A MIXED-USE DISTRICT

While smart growth is a “smart” idea that should be advanced wherever possible, city planners and developers should be advised that mixed-use development is not a panacea for all the ills of urban sprawl. As discussed earlier, Euclidian zoning arose in the early twentieth century in order to prevent the negative impacts (or perceived negative impacts) of co-locating industrial and residential uses. The United States Supreme Court and state courts found at that time that the separation of uses creates a better quality of life for residents.

Today, however, mixed-use development is necessary in order to use resources more efficiently to meet the demands of the growing population and reduce GhG emissions. Unfortunately, the compatibility issues that lead to single-use zoning are resurfacing in this new era of mixed-use. Thus, planners are stuck with a dichotomy that must be resolved in order to achieve both the goals of environmental responsibility and maintaining a high quality of life in an urban setting. Consequently, the task of planning for the future growth of cities is more difficult than ever.

A. Preventing Conflicts Between Land Uses

Industrial and commercial businesses are vital to a mixed-use district’s ability to thrive. Retaining existing businesses is necessary to meet the goals of SB 375 and smart growth because businesses provide an employment base for the new residents of the district and sustain the jobs-housing balance. Moreover, providing employment opportunities in close proximity to residential uses promotes walking and reduces vehicle miles traveled.

Despite these benefits of co-location, however, residential uses can be incompatible with industrial uses and other commercial activities. For example, an industrial facility may emit carcinogens or other pollutants harmful to residents, particularly children. Businesses may also generate other annoyances, such as noxious odors, excessive noise from operations or trucking, or nighttime lighting that interferes with sleep. It may be impossible to adjust the existing business operations in a manner that is both compatible with residential uses and profitable to the same degree.

Although the residents come into the nuisance by choosing to live in the mixed-use district, they often do not realize how much the nearby business operations will impact their quality of life until they experience it daily and around the clock. As a result, residents will complain about the offending activity of the business and city officials may cater to the residents to obtain their vote or favorable media attention. Consequently, the cities can make decisions that interfere with the existing uses. For example, cities may require the existing uses to implement costly mitigation measures in order to reduce the perceived adverse effects on new residential developments, particularly through conditions of approval for permits to modify or expand their facility or operations. Also, where residential opposition is strong, an industrial use may be completely denied the permits necessary to expand its operations.⁴⁵

Some metropolitan areas are already experiencing such conflicts between existing industrial uses and residential infill. For example, last year, the Los Angeles planning and redevelopment agencies were in heated debate with the city’s politicians and developers over the agencies’ recommendation to prohibit

residential uses in 80% of the currently industrial zoned downtown.⁴⁶ The City of Oakland was also under political pressure to redevelop its industrial areas with residential uses.⁴⁷ After allowing residential infill in the less-expensive industrial areas, Oakland officials were confronted with greater demand to allow the redevelopment of its central waterfront area, which had historically been occupied by heavy industrial uses.⁴⁸ The waterfront businesses objected, feeling that residential uses would threaten their operations.⁴⁹ Critics have suggested that Oakland’s residential redevelopment “led many potential industrial businesses to set up shop in other cities rather than risk a large investment and then get pushed out.”⁵⁰ In downtown Portland, some businesses have even been displaced as a result of the increased property values caused by residential infill.⁵¹ Businesses were receiving complaints about their activities from residents, and, as a result, Portland recognized that it must “walk a fine line between encouraging mixed-use development and saving the city’s core industries.”⁵²

This conflict of uses between the residential and commercial/industrial constituents of a community can also lead to litigation, which in turn delays residential projects and increases the cost of development. For example, in *Del Mar Union School District v. City of San Diego*, Riverside Super. Ct. Case No. RIC390673 (2004), the Del Mar Union School District brought a challenge under the California Environmental Quality Act (“CEQA”) to rescind approval of a project that would place biotechnical laboratory facilities within close proximity of a planned elementary school.⁵³ The biotechnical laboratory facilities were permissible under the master plan for a mixed-use project on a 485.5-acre site, which allowed “scientific research and development facilities.”⁵⁴ However, despite the fact that the master plan and environmental study had been approved prior to the approval of the plans for the construction of the elementary school, the School District sued the city, asserting that the biotechnical facilities were incompatible with the planned elementary school due to the facilities’ use of hazardous materials.⁵⁵ Although the court did not rule on the incompatibility of uses, it found the environmental review to be inadequate for other reasons⁵⁶ and issued a writ of mandate requiring that the City rescind the approval of the permit allowing the biotechnical facilities.⁵⁷ Due to the School District’s opposition to the construction of the biotechnical facilities, the facilities were never constructed.⁵⁸ Instead, the lot was re-designated for high-rise residential condominiums, which resulted in a significant reduction in the employment opportunities available within the mixed-use development.⁵⁹

These examples demonstrate that the business operations of a mixed-use development may be negatively impacted by the influx of residential uses. To the extent that the businesses are no longer profitable or viable, the city may experience industrial flight. When residential development invades an area that has historically been designated or zoned for commercial and industrial use, businesses may choose to move out of the area rather than fight the complaints of residents or modify their facilities to accommodate residents.⁶⁰

Industrial flight can lead to urban decay, which is the deterioration of an urban area when vacated buildings are not re-occupied by new businesses. Urban decay not only results in blighted urban landscapes, but also a loss of employment,

A tool that cities may wish to consider including in the compatibility methodology is the use of a buffer. A buffer area is an appropriate and effective means to control the impacts from conflicting land uses.⁶⁶ In *Placer Ranch Partners v. County of Placer*, 91 Cal. App. 4th 1336, 1342-1343 (2001) (hereafter, *Placer Ranch*), the court held that the “[c]ounty acted properly in deciding to... require a one-mile buffer between the landfill and any residential development.” The court found that, even if no other jurisdictions had required such a large buffer between a landfill and residential areas and even if “there was no scientific evidence presented that a one-mile buffer was necessary,” substantial evidence supported the county’s decision.⁶⁷ “The landfill was an important and valuable county asset,” and “[i]f residential areas encroached on that space, its period of usefulness might be reduced.”⁶⁸ As it was, “[r]esidents from more than two miles away from the current landfill had complained of dust, odors, litter and traffic.”⁶⁹ Placer County is not alone in using buffers to prevent conflicts between existing industrial and encroaching residential uses. A 1,000-foot buffer was adopted by the City of Chula Vista to separate residential and pollutant-emitting industrial uses;⁷⁰ and the Port of San Diego requires a 1,000-foot buffer to protect the waterfront, which is developed with businesses that contribute over 38,000 jobs and nearly \$6 billion annually to the area economy.⁷¹

As shown above, properly planning for a mixed-use district is fraught with complexities. Seeking input from both the residential development and business communities may help city planners find creative solutions in balancing a mix of uses while maintaining both a high quality of life for residents and profitability for businesses. Once adopted, it is important that the mixed-use plan be implemented with care. City planners should be aware that the success of the mixed-use community is at risk if developers are permitted to stray too much from the plan. City planners and developers would further benefit from a heightened assessment of the environmental risks associated with mixed-use zoning. Such review would help ensure the success of residential infill projects and reduce the likelihood that city planners and developers would be subject to lawsuits for inadequate environmental review.

VI. CONDUCTING ADEQUATE ENVIRONMENTAL REVIEW OF THE MIXED-USE PLAN

Once a city’s mixed-use plan is developed, but before it is approved, the city must conduct an environmental review of the plan to inform decision-makers and the public of the plan’s impacts.⁷² A plan is a “project” that requires environmental review under CEQA where it is undertaken or approved by a public agency and where it may cause a significant direct, or a reasonably foreseeable indirect, environmental impact.⁷³ An “environmental impact” is a physical change in the surroundings, or a social or economic impact that results in a physical change.⁷⁴ An “impact” includes not only harm to plant and animal life but also to the quality of human life.⁷⁵

Plans for mixed-use districts typically result in direct impacts on the environment through one or all of the following: traffic, noise, air quality, public services, park lands, or other quality of life issues. It is important to note that mixed-use districts can also cause socio-economic impacts that result in physical impacts on the environment, such as urban decay

(when the mixed-use development is unsuccessful and industry flight leads to unoccupied, abandoned spaces). With any plan for a mixed-use development, all the above listed potential environmental impacts should be analyzed and addressed.⁷⁶

A. A PEIR Can Adequately Analyze the Plan

While an Environmental Impact Report (“EIR”) is typically used to study the environmental impacts of a specific development project,⁷⁷ a Program Environmental Impact Report (“PEIR”) is used to study the impacts of a broadly applicable program, plan, or policy.⁷⁸ If a city creates an urban mixed-use plan composed of policies, codes, and/or guidelines for development similar to that described above, a PEIR would be the appropriate form of environmental review. Later site-specific infill projects can then incorporate the analysis of the broad issues discussed in the PEIR and focus only on a detailed examination of the unique effects of the particular project in an EIR or less intensive analysis.⁷⁹ This approach to environmental review is called “tiering” because it enables a broad-to-narrow, general-to-specific review of environmental impacts, thereby avoiding repetitive analysis.⁸⁰

Not only is a PEIR the most efficient method of studying the environmental impacts of a city’s plan for a new residential mixed-use community, it may also be the only way to adequately analyze and mitigate the cumulative impacts of the residential projects proposed in furtherance of the plan. A “cumulative impact” occurs when two or more individually minor impacts combine to create a collectively significant impact.⁸¹ If individual residential infill projects prepare only project-specific EIRs without the benefit of a PEIR for the area-wide mixed-use plan, the impacts of each project that are not significant on their own can incrementally compound with other projects’ impacts to result in a significant impact.

For example, if there are 13 residential infill projects proposed for development in the existing urban area, and each one only contributes 0.019 to the volume-to-capacity ratio of a road segment, where the threshold of significance is 0.02, the project EIRs will find no significant impact on traffic. However, added together, the projects increase traffic by 0.247, which does exceed the threshold of significance. Since the cumulative impacts of all projects must be studied and mitigated under CEQA,⁸² a programmatic analysis of the build-out of the mixed-use plan is necessary to capture and mitigate such cumulative impacts.

The issue of the cumulative impacts in the context of urban infill was addressed by the courts in 1989 in *San Franciscans for Reasonable Growth v. City and County of San Francisco*, 151 Cal. App. 3d 61 (1984). Millions of square feet of office development projects were under environmental review by the City and County of San Francisco.⁸³ In conducting the environmental review for four of the projects, San Francisco only considered approximately one-quarter to one-half of the projects in analyzing the overall cumulative impacts of this massive influx of office uses.⁸⁴ The courts rejected this approach and revoked the project approvals because the EIR did not include all of the office projects currently under environmental review in the downtown area.⁸⁵ Extending the court’s reasoning to urban residential infill plans, the cumulative impacts analysis for each project must include the impacts of all other anticipated residential projects in the mixed-use district.

Rather than attempting to take on such an extensive analysis in individual EIRs for each project, a city could study the impacts of the build-out of the residential mixed-use plan in a PEIR. The individual projects could then tier from the PEIR and incorporate by reference its findings, thereby satisfying CEQA's cumulative impacts requirement. This programmatic approach is consistent with the CEQA Guidelines,⁸⁶ which recognize that, "[w]ith some projects, the only feasible mitigation for cumulative impacts may involve the adoption of ordinances or regulations rather than the imposition of conditions on a project-by-project basis."⁸⁷ Accordingly, it is probably infeasible to mitigate the cumulative impacts of an area-wide mixed-use plan by imposing conditions on each individual project. A comprehensive environmental review of the plan itself allows for the adoption of universal mitigation measures that can more thoroughly and effectively address the impacts, both direct and cumulative, of the residential infusion into the area. This programmatic approach carries out CEQA's mandate to maximize the mitigation of environmental impacts.⁸⁸ Therefore, programmatic environmental review of the mixed-use plan can ensure adequate mitigation of the impacts of creating an urban mixed-use district.

Note that SB 375 adds a chapter to CEQA (Chapter 4.2, commencing with Section 21155, to Division 13, of the Public Resources Code) that provides certain streamlining measures for "Transit Priority Projects," which are projects that are consistent with the goals outlined in SB 375.⁸⁹ Qualifying projects are not required to address either growth-inducing impacts or any project-specific or cumulative impacts from light vehicle traffic on the regional transportation network.⁹⁰ However, SB 375's CEQA streamlining measures do not apply to projects that conflict with nearby operating industrial uses.⁹¹ Thus, even SB 375 recognizes that while California must transition its urban areas to transit-oriented and mixed-use districts, the introduction of residential infill must be completed in a way that avoids unmitigated conflict with the existing industrial and commercial land uses of the area.

B. Use of Project-Specific EIRs May Be Inadequate

Failure to conduct programmatic review disposes a mixed-use project to a potential CEQA challenge for segmentation or "piecemealing."⁹² The CEQA Guidelines state that a project "means the whole of an action."⁹³ As a result, a development proposal must have an accurate project description that includes all aspects of the development being considered.⁹⁴ If individual development projects incrementally implement an urban residential infill plan, i.e., through spot-zoning, without a city first undertaking environmental review of the broad-scale impacts of the plan, the project EIRs could be determined to be illegal segmentation of the mixed-use project.

Although there is no appellate case law applying the concept of illegal segmentation of project descriptions in the context of urban infill mixed-use planning, the legal foundations for the argument have been laid. For example, in *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus*, 27 Cal. App. 4th 713, 734-735 (1994), the court held that an EIR prepared for a mixed-use development project was inadequate because it failed to consider the expansion of a sewer plant that was necessary for the project to proceed.

This same rationale can be applied to the creation of an urban infill mixed-use community. Since multiple individual residential projects are necessary to achieve the goals of a mixed-use plan, approving one individual project at a time results in piecemeal creation of the mixed-use community as a whole. Accordingly, proceeding with the development of an urban mixed-use community through individual developments and project-specific EIRs is risky, as the projects could be challenged as piecemeal approvals that segment the mixed-use plan.

VII. CONCLUSION

Development of urban mixed-use districts is fraught with complexities that are not present with traditional Euclidian zoning. While residential infill in existing commercial downtown areas can advance the goals of SB 375 and achieve smart growth, if poorly planned and implemented, the mixed-use district may cause the flight of existing businesses and result in unoccupied residential units. The most prudent approach to creating a mixed-used community is to carefully plan the mixed-use district and perform programmatic environmental review before approving individual residential infill projects on a project-by-project basis. Absent this careful approach, individual project approvals are left vulnerable to challenges under CEQA. Ensuring that the mixed-use district is self-sufficient and sustainable by thorough planning and strict implementation of the city's planning methodology will benefit all parties - businesses, residents, developers, and public agencies alike.



Jessica A. Johnson is an associate in the Land Use and Natural Resources practice group at the Orange County office of Sheppard Mullin Richter and Hampton. She handles matters for corporations, developers, and public agencies involving compliance with the California Environmental Quality Act, Planning and Zoning Law, and local development regulations.



Daniel P. Bane is an associate in the Land Use and Natural Resources practice group at the Orange County office of Sheppard Mullin Richter and Hampton. He handles matters for corporations, developers, and public agencies involving compliance with the California Environmental Quality Act, Planning and Zoning Law, and local development regulations.

ENDNOTES:

- 1 For convenience, "cities" are referred to in this article, but the ideas equally apply to counties with planning activities.
- 2 See *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); 1 ADAM U. LINDGREN & STEVEN T. MATTAS, CALIFORNIA LAND USE PRACTICE § 5.1 (CEB, 2008) (hereafter, LAND

- USE PRACTICE).
- 3 LAND USE PRACTICE § 5.1.
- 4 *Id.* § 4.2.
- 5 *Id.*
- 6 *Id.* §§ 4.2-4.3.
- 7 See *Id.* § 4.2; 1 JAMES LONGTIN, CALIFORNIA LAND USE at 234 (2nd ed. 1987).
- 8 The zoning development standards do not address the safety and structure of the buildings, which are issues governed by building and housing codes.
- 9 JAMES LONGTIN, 150 YEARS OF LAND USE at 2 (1999); LAND USE PRACTICE § 4.2.
- 10 LAND USE PRACTICE § 5.1.
- 11 *Euclid*, 272 U.S. at 379.
- 12 *Id.* at 389.
- 13 *Id.* at 380, 389.
- 14 *Id.* at 380.
- 15 *Id.* at 379, 382.
- 16 *Id.* at 384.
- 17 *Id.* at 391.
- 18 *Id.* at 391-394.
- 19 See LAND USE PRACTICE § 5.1.
- 20 “Urban sprawl” is the effect of the outward spread of “low-density, automobile-dependent development” from the fringe of an urban area. *Id.* § 3.7.
- 21 *Id.* § 5.1.
- 22 *Id.* §§ 3.3, 3.9, & 5.49.
- 23 *Id.* § 3.9.
- 24 *Id.* § 5.47; cf. *id.* § 5.1.
- 25 *Id.* § 5.47. An “overlay zone” creates additional regulations applicable to the defined area over which it is placed without altering the existing underlying zoning. *Id.* § 5.15.
- 26 *Id.* § 5.5.
- 27 *Id.*
- 28 *Id.*
- 29 *Id.* § 5.7; Congress for the New Urbanism, *Charter of the New Urbanism*, available at <http://www.cnu.org/charter> (last visited Jan. 15, 2009).
- 30 Congress for the New Urbanism, *Charter of the New Urbanism*, available at <http://www.cnu.org/charter> (last visited Jan. 15, 2009).
- 31 Smart Growth Online, *About Smart Growth*, available at <http://www.smartgrowth.org/about/default.asp> (last visited February 10, 2009).
- 32 See LAND USE PRACTICE §§ 3.3, 3.9, & 5.49.
- 33 See *id.* § 5.47; see also Mark Hinshaw, *The Case for True Urbanism*, PLANNING, June 2005; available at <http://www.planning.org/planning/2005/jun/trueurbanism.htm> (last visited Jan. 15, 2009).
- 34 CAL. HEALTH & SAFETY CODE § 38500 *et seq.*
- 35 Senator Darrell Steinberg, *SB 375 Connects Land Use and AB 32 Implementation*, THE PLANNING REPORT, July 2007, available at http://www.planningreport.com/tp/?module=displaystory&story_id=1257&format=html (last visited Jan. 15, 2009).
- 36 *Id.*
- 37 *Bill Analysis, S. Transportation and Housing Comm. Hearing*, August 29, 2008, available at http://www.leginfo.ca.gov/pub/07-08/bill/sen/sb_0351-0400/sb_375_
- 15, 2009); CAL. GOV'T CODE §§ 65080, 65080.01, 65400, 65583, 65584.01, 65584.02, 65584.04, 65587, 65588 14522.1, & 14522.2.
- 38 *Id.*
- 39 Office of the Governor, *Senate Bill 375: Redesigning Communities to Reduce Greenhouse Gases*, Oct. 1, 2008, available at <http://gov.ca.gov/index.php?/fact-sheet/10707/> (last visited Jan. 15, 2009).
- 40 *Id.*
- 41 *Id.*
- 42 *Id.*
- 43 See CAL. PUB. RES. CODE § 21155.1, 21155.2, & 21159.28, as added by SB 375; see also CAL. GOV'T CODE § 655583, as amended by SB 375; and CAL. GOV'T CODE § 65080, as amended by SB 375.
- 44 *Id.*
- 45 See, e.g. *Del Mar Union School Dist. v. City of San Diego*, Riverside Super. Ct. Case No. RIC390673, at 2 (2004) (minutes of the super. ct. re statement of decision on writ of mandate).
- 46 Anna Scott, *Industrial Fight Heats Up*, LOS ANGELES DOWNTOWN NEWS.COM, Jan. 14, 2008, available at <http://www.downtownnews.com/articles/2008/01/14/news/news01.txt> (last visited Jan. 15, 2009).
- 47 Cecily Burt, *Oakland Officials Wrestle Over Land*, OAKLAND TRIBUNE, Feb. 16, 2007, available at http://findarticles.com/p/articles/mi_qn4176/is_20070216/ai_n18628280 (last visited Jan. 15, 2009).
- 48 *Id.*
- 49 *Id.*
- 50 *Id.*
- 51 Bryan E. Powell, *Mixed Feelings About Mixed-Use*, SEATTLE DAILY JOURNAL OF COMMERCE, Oct. 7, 2004, available at <http://www.djc.com/news/re/11161876.html> (last visited Jan. 15, 2009).
- 52 *Id.*
- 53 *Del Mar Union School Dist. v. City of San Diego*, Riverside Super. Ct. Case No. RIC390673, at 2 (2004) (minutes of the super. ct. re statement of decision on writ of mandate).
- 54 *Id.* at 5-6.
- 55 *Id.* at 1-2.
- 56 These reasons are noted in the Statement of Decision on Writ of Mandate. *Del Mar Union School Dist. v. City of San Diego*, Riverside Super. Ct. Case No. RIC390673, at 6.
- 57 *Id.* at 6.
- 58 Torrey Hills Community Coalition, *Community Alert*, Sept. 6, 2008, available at http://torreyhillsc.org/index.php?option=com_content&task=view&id=43&Itemid=46 (last visited Jan. 15, 2009); Minutes of the San Diego City Council Meeting, Sept. 16, 2008, 41, available at <http://docs.sandiego.gov/councilminutes/2008/min20080916rm.pdf> (last visited Jan. 15, 2009).
- 59 Minutes of the San Diego City Council Meeting, Sept. 16, 2008, 41, available at <http://docs.sandiego.gov/councilminutes/2008/min20080916rm.pdf> (last visited Jan. 15, 2009).
- 60 See, e.g. *Del Mar Union School Dist. v. City of San Diego*, Riverside Super. Ct. Case No. RIC390673 (2004); Anna

- Scott, *Industrial Fight Heats Up*, LOS ANGELES DOWNTOWN NEWS.COM, Jan. 14, 2008, available at <http://www.downtownnews.com/articles/2008/01/14/news/news01.txt> (last visited Jan. 15, 2009); Cecily Burt, *Oakland Officials Wrestle Over Land*, OAKLAND TRIBUNE, Feb. 16, 2007, available at http://findarticles.com/p/articles/mi_qn4176/is_20070216/ai_n18628280 (last visited Jan. 15, 2009); Bryan E. Powell, *Mixed Feelings About Mixed-Use*, SEATTLE DAILY JOURNAL OF COMMERCE, Oct. 7, 2004, available at <http://www.djc.com/news/re/11161876.html> (last visited Jan. 15, 2009).
- 61 Note, "mixed-use" is used through this section and the remainder of the article not only as its own concept, but also interchangeably or collectively with the concepts of smart growth, transit-oriented development, and new urbanism, unless otherwise specified.
- 62 See David Phillips, *The Cult of New Urbanism*, THE NEW PLANNER, Fall 2007, available at <http://www.planning.org/thenewplanner/2007/fal/newurbanism.html> (last visited Jan. 15, 2009).
- 63 See *id.*
- 64 See *id.*
- 65 See *id.*
- 66 1 JAMES LONGTIN, CALIFORNIA LAND USE, 267 (2008 Update); LAND USE PRACTICE § 5.20.
- 67 *Placer Ranch Partners v. County of Placer*, 91 Cal. App. 4th 1336, 1342 (2001).
- 68 *Id.*
- 69 *Id.*
- 70 City of Chula Vista General Plan, E 32, available at http://www.chulavistaca.gov/City_Services/Development_Services/Planning_Building/General_Plan/documents/09_Env2.pdf (last visited Jan. 15, 2009).
- 71 Thor K. Biberan, *Port of San Diego approves buffer between industrial, residential uses*, THE DAILY TRANSCRIPT, Sept. 6, 2005, available at <http://www.sddt.com/news/article.cfm?SourceCode=20050906tdg> (last visited Jan. 15, 2009); *A Vibrant Downtown: Ambitious Ballpark Village*, *Meris Council Supports The San Diego Union-Tribune*, Sept. 15, 2005, available at http://www.signonsandiego.com/uniontrib/20050918/news_lz1ed18top.html (last visited Jan. 15, 2009).
- 72 CAL. PUB. RESOURCES CODE § 21061.
- 73 *Id.* § 21065.
- 74 CAL. CODE REGS. tit. 14, §§ 15358, 15378, & 15382 (hereinafter, CEQA Guidelines).
- 75 CEQA Guidelines §§ 15358 & 15360.
- 76 CEQA Guidelines §§ 15126, 15126.2, & 15131.
- 77 CEQA Guidelines § 15161.
- 78 *Id.* § 15168.
- 79 *Id.* § 15385.
- 80 *Id.*
- 81 *Id.* § 15355.
- 82 *Id.* § 15130.
- 83 *San Franciscans for Reasonable Growth v. City and County of San Francisco*, 151 Cal. App. 3d 61, 69 (1984).
- 84 *Id.* at 68-69.
- 85 *Id.* at 74.
- 86 The CEQA Guidelines are administrative regulations promulgated to give further direction for complying with the CEQA provisions of the California Public Resources Code. They can be found at CAL. CODE REGS. tit. 14, § 15000 *et seq.*
- 87 CEQA Guidelines § 15130(c).
- 88 CEQA Guidelines § 15021, 15126.4.
- 89 PUB. RES. CODE § 21155 *et seq.*, as added by SB 375.
- 90 *Id.* § 21159.28.
- 91 *Id.* § 21155 *et seq.*
- 92 PRACTICE UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT §§ 20.93, 10.13 (CEB 2008); see *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus*, 27 Cal. App. 4th 713, 730 (1994).
- 93 CEQA Guidelines § 15378.
- 94 *Id.* § 15124; *San Joaquin Raptor*, 27 Cal. App. 4th at 730.

*Do you have an article you would like published?
Or maybe an idea for one?*

The **CALIFORNIA** **REAL PROPERTY JOURNAL**

*welcomes and encourages the submission
of articles from its readers and others!*

For more information please contact:

Scott Rogers — Tel: (415) 268-1990 or Email: scott.rogers@hro.com

David Roth — Tel: (510) 482-6600 or Email: david@rothrealestatelaw.com

