# Is Land Use in California Dead?

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For decades, California has been the nation's premier thought-leader and legislative pioneer with respect to land use planning and environmental issues. While California's goals have been lofty and its regulatory regime has attracted considerable positive attention, was its regulatory environment prepared for a global credit crisis? Can California's land use model adapt to the changed economic environment?

Historically, while real estate development has been cyclical, a reliable countervailing factor in California was that as the regulatory complexity grew, so did the value of obtaining entitlements. Entitled land was often worth up to hundreds of times its pre-entitlement value, and many developers could justify the cost of California's rigorous and lengthy entitlement process because of the potential financial upside once the property was entitled. In past down cycles, while the endeavor was more risky, the financial upside still sufficiently motivated owners and developers to pursue entitlements. Today, California developers are asking themselves whether entitling and developing property is worth it.

These peculiar times have also seen a rapid change in the mix of players. Joining the ranks of "traditional" developers are a host of lenders, investors, and distressed asset funds, some relatively new to California's complex rules. While time will ultimately tell whether California's regulatory environment can adapt to and survive the changed economic environment, in the interim, savvy owners and developers are finding ways to maximize value and prosper. Land use in California is different today than it was two years ago, but it is alive and well.

## Preserving Entitlements, Re-Negotiating Fees, and Re-Positioning Projects

In general, entitled land in California remains more valuable than unentitled land. Due to the time, expense, and uncertainty in obtaining entitlements, developers, and land owners - and increasingly investors and foreclosing lenders – should be highly motivated to preserve entitlements and seek to re-negotiate them wherever possible.

Extending the life of entitlements has become paramount as credit and capital availability lag. As in past economic downturns, the California legislature has enacted laws extending the life of subdivision maps. Senate Bill 1185 was enacted in 2008 and provides an automatic one-year extension for certain subdivision maps. It also authorizes local governments, at their discretion, to approve an additional one-year extension of a tentative map. Administrative or other approvals issued by certain state agencies are also automatically extended by one year under this legislation. In July, another two-year legislative extension was enacted, providing additional protection for existing tentative and parcel maps.

In California, another mechanism exists to extend subdivision maps much longer. Statutory development agreements enable subdivision maps to be extended for the term of the development agreement, which can be twenty years or more. Impact fees and related exactions may also be negotiated and "locked in" through development agreements, together with zoning and other entitlements. Such agreements, upheld by *Santa Margarita Area Residents Together v. San Luis Obispo County* (App. 2 Dist. 2000) 84 Cal.App.4th 221,100 Cal.Rptr.2d 740, , transcend political transitions as city councils and county boards of supervisors change over time.

Similarly, in redevelopment areas, master developers may not only have negotiated a development agreement, but also a disposition and development agreement (DDA), which embodies the business terms and long-term phasing of the project. During this economic downturn, in certain instances, developers and redevelopment staff, as public/private partners, are working together to re-examine proposed development, identify flexibility and adapt projects for mutual benefit. Substantive amendments to the existing DDA and project approvals, including the development agreement, can preserve and enhance value and extend the life of the project to correspond with future economic recovery.

In recent years, monetary (e.g., impact fees) and non-monetary (e.g., dedications) exactions have grown exponentially in California. Traditional fees imposed to mitigate impacts to public infrastructure expanded to include affordable housing, child care, and loss of agricultural land. In addition, many fees reflect high "level of service" standards and peak of the market land acquisition, and construction costs. The fees developers used to live with fail to reflect current market realities and may render projects infeasible. In response to statewide reform efforts spearheaded by trade organizations, many cities have reduced and deferred their fees. For projects where high impact fees have not yet been paid, owners and developers could seek significant reductions as part of their general evaluation of project conditions and repositioning efforts.

## Environmental Impact Review & Green Building Issues

Just as extending the life of or modifying existing entitlements has become critical, reducing the length of time required for developer-funded environmental review of unentitled or modified projects can substantially reduce costs and add value to a project. California's mandatory environmental review statute – the California Environmental Quality Act (Pub. Resources Code, § 21000 *et seq*.), commonly referred to as CEQA – provides multiple tools and processes for streamlining environmental review. In addition, numerous CEQA exemptions are available to specific classes of development projects. For example, as a result of the enactment of Senate Bill 375 in 2008, which seeks to statutorily link land use and transportation planning in an effort to reduce greenhouse gas emissions, certain "transit priority projects" are exempt from CEQA. "Transit priority projects" are projects with at least 50 percent residential use and a minimum net density of 20 dwelling units per acre, located within one-half mile of a major transit stop or high quality transit corridor included in a regional transportation plan. (Pub. Resources Code, § 21155(b).) By utilizing these types of exemptions and other streamlining techniques, an otherwise lengthy entitlement process can potentially be simplified, with developers achieving significant cost-savings and adding value to otherwise unentitled property.

Despite the downturn, local jurisdictions throughout California continue to impose mandatory green building requirements. In some cases, these requirements are tied to the LEED rating system developed by the U.S. Green Building Council. For several years preceding the economic downturn, the standard developer response was that these new requirements imposed substantial costs that only added to the complexity and expense of development projects. Today, the tide appears to be turning, with California developers recognizing the potential marketing and business benefits to be obtained by a green-certified project. In addition, cities, such as San Francisco, offer expedited processing for “green” projects.

## Creating Working Capital through Fee Refunds and Reimbursements

When real estate values were escalating, developers often pre-paid impact fees to avoid proposed increases. In many instances, lots for which fees were paid have not yet been built out and remain dormant. In addition, developers were often required to build over-sized infrastructure to serve neighboring projects, with the expectation of future reimbursements from other developers and agencies. As projects falter and developers lay off the employees who managed them, considerable fee payments and reimbursement rights may be forgotten, leaving substantial sums in others’ hands.

For projects now dormant after fees were paid, owners should consider seeking refunds rather than allowing agencies to bank fees as credits. Refunds may be justified because the anticipated impacts are not occurring, and fees can be "re-collected" when building permits are subsequently pulled. Refunds are attractive to create working capital. If a project is sold, the market may not give dollar-for-dollar value for pre-paid fees left as credits, since it could be years before homes are built and their value is realized.

In the case of reimbursements, sometimes obtaining them is merely a matter of auditing the project records and making requests to the appropriate parties. Similarly, owners may be able to invoke various reimbursement statutes that prevent “double payment” – e.g., if facilities covered by fees were also funded by assessment districts or the state.

## Challenges Remain

The global credit crisis has caused a domino effect. California is experiencing an unprecedented budget crisis, the likes of which have not been seen since World War II. In its search for funding sources, the state is seeking to take or borrow local government revenues, and in particular redevelopment funds. In addition, as cities and counties become increasingly impacted, developers will face planning and redevelopment staff reductions, which will likely increase the time and, as a result, the cost of obtaining approvals.

The California economy, though hit hard in the current global crisis, is expected to climb out of the downturn faster than other parts of the U.S. Savvy developers, land owners, investors, lenders and distressed property managers with foresight should seek to use every land use tool available to maintain the value of their entitlements or reposition their properties for value in the long term. Land use in California is not dead, quite the contrary; it is alive and well, offering a multiplicity of tools for enhancing the value of California real estate.