

3-2008

Deficient Development Agreements

Roger Bernhardt

Golden Gate University School of Law, rbernhardt@ggu.edu

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/pubs>

 Part of the [Property Law and Real Estate Commons](#)

Recommended Citation

Bernhardt, Roger, "Deficient Development Agreements" (2008). *Publications*. Paper 280.
<http://digitalcommons.law.ggu.edu/pubs/280>

This Article is brought to you for free and open access by the Faculty Scholarship at GGU Law Digital Commons. It has been accepted for inclusion in Publications by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

March 2008

Deficient Development Agreements

Roger Bernhardt

In *Neighbors in Support of Appropriate Land Use v County of Tuolumne* (2007) 157 CA4th 997, 68 CR3d 882, reported on p 58, the Fifth District Court of Appeal threw out a development agreement (and the associated conditional use permit) between Tuolumne County and the Petersons because, the court held, it was inconsistent with the county's zoning ordinance. The development agreement purported to permit the Petersons to host lawn parties and weddings on their 37-acre property.

Lawn party hosting was neither a permitted nor a conditionally allowed use under the 37-acre minimum lot size agricultural zoning classification the county had previously applied to the property. That made the conditional use permit (CUP) almost ipso facto invalid; a permit cannot be issued to cover what has never been declared an appropriate conditional use in the authorizing ordinance.

More important, issuance of the CUP could not be justified under the ordinance on which the development agreement was based, because that ordinance violated Govt C §65852, the uniformity requirement of the Planning and Zoning Law (Govt C §§65000–66499.58), which states that “all [zoning] regulations shall be uniform for each class or kind of building throughout each zone.”

The philosophic aspects of the controversy must have been deemed important, since the actual fight was more of the tempest-in-a-teapot variety. As far as the facts on the ground were concerned, this 37-acre parcel was bordered by two similarly zoned parcels to its west, but was flanked by 2- to 5-acre parcels on the north, south, and east (where I surmise that the challenged activity might have been allowed). Consequently, it might have required only the redrawing of a line on the zoning map to place the parcel into a different and more lenient classification. The county supervisors were considering a text amendment to the zoning ordinance that would have reclassified lawn parties as conditional uses in its 37-acre agricultural zones, which would have accomplished the same result. No one appeared to contend that either of those acts would have been invalid. In other words, the same result could have been reached, just by a different route, and the politics would probably have been the same, since the same procedural features (public notice, hearing, and vote) would have remained applicable—*e.g.*, same public supporters and opponents, same supervisors. So why did it matter so much that the county attempted to achieve this result by development agreement rather than by zoning amendment?

Some background on two troublesome characteristics of land use regulations—uniformity and revisions—may help.

Uniformity Within a Zone

On their face, zoning laws would seem to violate the principle of equal protection: X is permitted to build a factory on his land because it is zoned industrial, whereas Y, a block away, can erect only a house on hers, because it is zoned residential instead. Endorsers of zoning dodge

this problem by claiming that there is the necessary uniformity inside each zone, even if it is lacking outside each zone. Without that proposition, all zoning would fail.

But uniformity does not always make for good planning; it too easily leads to a ticky-tacky, monotonous neighborhood where no one wants to live, or even visit. As a consequence, combined with our two-value zoning rules—where every use should be either permitted or prohibited—are escape routes. Land use regulation includes mechanisms designed to reduce rigidity: amending zoning ordinances and maps, conditional uses, and (although not exactly intended to have that effect) variances.

While those devices have been part of the system since its start, more came along later: design review, planned unit developments, floating zones, and historic preservation. The departure from as-of-right zoning has become even more dramatic as the zoning process has become more like that of subdivision regulation, where predetermined rules that had set forth known predictable standards have been replaced by after-the-fact reaction and negotiation from local officials to development proposals that are initiated by developers rather than by planners. We may still pay lip service to the earlier notion of uniformity, but there is no longer much realism behind the idea that all properties are being treated equally now that each proposal is judged separately and independently. Flexibility has won out over equality.

Changing the Rules in Midstream

Among the many risks that land development entails is the danger that the legal climate that existed while the development was being planned will change for the worse before the project has been completed and taken off the developer's books. If you have already purchased and paid for the land (and perhaps also for, *e.g.*, the building plans), where will you be if the town alters its local height, space, or use limits before your construction has started?

The doctrine of vested rights is designed to protect the finished product from most changes that could materially hurt it thereafter; it is unlikely that a new height limit can have much effect on a completed and tenanted building (although, even then, there is the power to prohibit alteration of nonconforming structures, and the possible right to "amortize" them away over time). But at the front end of the calendar, a vested right generally does not come into being until after there has been substantial reliance upon the right building permit, which is an event that may not occur until after many millions of dollars have been spend on "preliminary" costs. See, *e.g.*, *Avco Community Developers, Inc. v South Coast Reg'l Comm'n* (1976) 17 C3d 785, 132 CR 386, where \$2.8 million had been spent before the rules changed.

Since any real estate development inevitably needs significant time from start to completion, a developer has to feel pretty certain that those horrors are unlikely to occur, and the local officials who want to increase their tax revenues through development need to make sufficient assurances to encourage the necessary risk-taking. How can a community cross its heart in that way?

The traditional legal answer was that it cannot be done. Binding assurances can't be given because the police power cannot be bargained away. A local government cannot hamstring itself from passing new laws when new contingencies arise, or prevent its citizens from voting the rascals out of office in order to undo their machinations. But that rule, like the old-fashioned uniformity doctrine, is too detrimental to growth. Developers just cannot afford to take sought-for risks unless there is a way to fetter the police power to ensure that the rules don't change.

Thus, in California (and some other jurisdictions), we now have the statutory Development Agreement Law (Govt C §§65864–65869.5) to provide a different solution to that problem. Government Code §65865.4 creates a way to give assurance to the developer that it may carry out its project in accordance with the rules operative at that time, “notwithstanding any change in any applicable general or specific plan, zoning, subdivision, or building regulation adopted” thereafter. The need to give assurances has prevailed over the sanctity of the police power and the inability to bargain it away.

Development Agreements and Flexibility

Since the purpose of the development agreement statutes is to give such agreements the unambiguous protection that developers need to eliminate the uncertainties inherent in the vested rights and sanctity of police powers doctrines (and the gap between them), it would not seem to require that the process also must include a way for allowing additional nonuniform flexibility into the real estate projects created under them. The developer makes sure, independently, that all of the other conditions of the governmental land use regulatory scheme are satisfied, and then seeks the development agreement to guarantee that this current compliance will not be rendered obsolete by a later rule or rule change.

The agreement reached in Tuolumne County, however, does not seem to have been intended to deal with any problem of developer risk; it is unlikely that lawn party hosting entails much start-up capital investment. Rather, it was contrived to overcome the fact that commercial lawn party hosting was not a permitted use for that property under the existing zoning ordinance. That puts it under the flexibility issues that I earlier discussed, rather than the stability issues. The county had in fact toyed with the idea of amending its zoning ordinance to make lawn parties conditional uses in the 37-acre agricultural zones, which would have had exactly the same effect. (The opinion said that a CUP would have been different because it would have allowed all other owners to make similar requests, although that danger could have easily been avoided by making one of the conditions for this activity a finding that no similar use was too close by.)

But does the fact that a development agreement looks like an inappropriate method to deal with an “inflexible” zoning ordinance make it also an illegal method? Under Govt C §65866, all other land use rules continue to apply in the case of a development agreement “unless otherwise provided,” which might make one think that the agreement could thus otherwise provide as to a zoning rule. Government Code §65867.5 mandates that a development agreement can be approved only if it complies with the “general plan and any specific plan,” which also does not appear to require compliance with zoning ordinances. Given those provisions, is the legislature really prohibiting a development agreement that carries its own zoning regime with it?

The Development Agreement Manual published by the Institute for Local Government, the research arm of the League of California Cities, takes it for granted that a development agreement may constitute its own charter and may “contain provisions that vary from otherwise applicable zoning standards.” Inst. for Local Gov’t, Development Agreement Manual: Collaboration in Pursuit of Community Interest 9 (2002). Indeed, that publication goes on to advise that

attorneys need to decide what language to use in the event the parties agree to allow land uses that are inconsistent with the otherwise applicable zoning requirements in existence at the time the development agreement was negotiated. One approach is to include language saying that the

then-existing zoning ordinance governs, but only to the extent it is not inconsistent with any provision of the agreement....

... But Not Here

Given these authorities, it is no wonder that Tuolumne County planning staff, and perhaps even county counsel, thought the development agreement was a lawful alternative at the time the deal was drafted.

But none of that persuaded the court in this case. A development agreement could not be its own source of zoning regulations. In order to get around all of the contrary authorities just mentioned, the court had to dance around the statutes and dismiss the Development Agreement Manual on the ground that it contained no legal arguments, even though it was drafted by lawyers.

The chief reason given by the court for refusing to treat a development agreement as an independent source of land use authority (despite a special enabling statute) was the uniformity requirement I earlier discussed: Allowing a parcel to be regulated by a development agreement rather than a zoning ordinance would give its owners a benefit not shared by the owners of other properties similarly zoned. The fact that this already occurs whenever neighboring owners are differently zoned, or a single parcel is rezoned, or a conditional use permit (or variance) is granted to one but not another, was not enough to persuade it to abandon that principle. The fact that such outcomes are also upheld in contract zoning and conditional zoning situations fared no better—those cases were cited by the court, but distinguished away. The rules must be uniform within a district, despite all of these examples to the contrary. Flexibility can go only so far in vanquishing equality.

Can We Live With This?

For the parties involved in this case, the outcome seems hardly devastating; it should take but a small restructuring of techniques to reach the outcome that the owners and some county officials want. (Although some neighbors clearly disliked the idea, they apparently lacked the clout to stop it at the political level.)

For everybody else, *i.e.*, the rest of us, the holding merely instructs that to get what the client wants, one still must play the game by the oldest of all the old rules—the zoning has to match the activity. Get all of the entitlements the same as always, and use a development agreement to make them stick, not to make them different.