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What Do Those Who Disagree With a Development Agreement Do?

Roger Bernhardt

San Francisco Tomorrow v City & County of San Francisco

Law firms with clients hoping to get their proposed development projects approved (over expected neighborhood opposition), or who represent the neighborhood groups desiring to stop or cut back the proposed nearby project, should keep the decision in *San Francisco Tomorrow v City & County of San Francisco (Parkmerced Investors Props., LLC) (2014) 229 CA4th 498* ready for frequent reference—its unpublished as well as its published parts—because it serves well as a source book for guidance on many issues. The case involved the city's Parkmerced complex—a 152-acre, 3221-unit middle-class residential development, built by Met Life in the 1940s and now starting to fade. The current owners sought to replace many of the lower buildings with highrises and increase its overall capacity to some 9000 units.

There are more details in the case write-up on p 152, but briefly, this was a project that needed

- An EIR;
- An amendment to the San Francisco General Plan;
- Planning Code amendments (to create a special Parkmerced Use District);
- A zoning map amendment;
- A coastal zone permit; and

- A development agreement between the developer and the city, as well as review by the city's Historic Preservation Commission and its Board of Supervisors (and who knows how many other unmentioned local agencies).

Add to that the need to deal with judicial challenges (by traditional mandamus and administrative mandate) to San Francisco's urban design (land use), housing, and circulation elements of its general plan and their internal consistency with the project, as well as with due process challenges to the hearing process by rent-stabilized tenants fearing displacement. All give this opinion the flavor of a near-complete minicourse on land use.

The Other Parts of the Case

Personally, I wish that the unpublished parts of this lengthy (14,000 words) opinion, which dealt with plan consistency and CEQA issues, had also been published, although at the same time I could have lived without the published discussion and rejection of the project opponents' contentions that San Francisco's general plan failed to comply with the requirement of the state's zoning enabling act that the project be consistent with the population density standards of its general plan—because the general plan did not have adequate standards on the feature. It wasn't as if the question were why a community needs a general plan at all (*why not just pass zoning ordinances and then grant permit approvals or make development agreements on an ad hoc basis after an applicant has made a proposal?*), or why a general plan must include a land use element in the first place (*if everyone is already satisfied with the way things are?*), or why all the pieces have to be consistent with one another (*if different groups or different neighborhoods prefer different life styles?*); rather, it was the narrower and duller question of whether the general plan actually did include satisfactory population density standards—an issue not hard for the city to knock over in light of the many tables and numerical provisions in its plans. About the most that the rest of us can learn from this part of the decision is that a general plan does not need to say precisely just how many people the town wants per acre in this neighborhood, as long as some number can be inferred from its height and bulk limits and FAR ratios. (Similarly for building density: Height maps, bulk maps, and floor intensity ratios tell the public as much as its needs to know about the way neighborhood congestion should be regulated, making the plan valid enough to justify ordinances that are consistent with it. Since, as far as both population and building density are concerned, it is generally the developers rather than the planning staff who make the initial development decisions, expecting more precision from master plans does not sound too realistic or promising anyway.)

Due Process for the Objectors

The most interesting issue dealt with in the opinion was whether the tenants in rent-stabilized units that would be demolished under the new plans could claim that they had been denied procedural due process because they had not been given notice or an opportunity to be heard on the development agreement and the project approvals—features that were likely to lead to their displacement and thereby adversely affect their property rights.

Some of the tenants' arguments were more interesting than persuasive:

- That they had vested rights because the development agreement gave the developers (contrary) vested rights to

go ahead with their project (which I don't think is what the decision in *Pennsylvania Coal Co. v Mahon* (1922) 260 US 393, 43 S Ct 158, meant by its phrase "an average reciprocity of advantage"); or

- That a development agreement is an "entitlement" rather than a law, thus triggering due process protections (for those disintitled by it?).

But the premise behind these arguments does have some populist appeal.

Legislative or Adjudicative?

Constitutional rights are enforced by the United States Supreme Court and include due process notice and hearing protection, but enforcement differs depending on whether the challenged state action is legislative or adjudicative (often referred to as administrative or quasi-judicial). A landowner may have a mandatory right to be heard if its rights are being affected by an administrative action, but not if what is involved is a general legislative activity instead. The Supreme Court has left it to the state courts to decide on which side of that line the local process falls. For example, in *City of Eastlake v Forest City Enters.* (1976) 426 US 668, 95 S Ct 2358, the Court let the Ohio Supreme Court determine that rezoning of a parcel from industrial to dense residential was legislative rather than adjudicative, even though it affected only eight acres of land (owned by one entity).

Form Versus Substance

In California, our courts employ a formalistic rather than a substantive test for answering this question; they look at the process that generated the decision rather than the nature of the decision itself. Thus, an initiative blocking a multifamily development and, instead, rezoning the affected 68 parcels to single-family residential was held in *Amel Dev. Co. v City of Costa Mesa* (1980) 28 C3d 511, 514, reported at 4 CEB RPLR 25 (Mar. 1981), to be legislative activity, despite those particularizing features:

[Z]oning ordinances, whatever the size of parcel affected, are legislative acts.... A decision that some zoning ordinances, depending on the size and number of parcels affected and perhaps on other factors, are adjudicative acts would unsettle well established rules which govern the enactment of land use restrictions, creating confusion which would require years of litigation to resolve. Since such a decision is unnecessary to protect either the rights of the landowners or the public interest in orderly community planning and development, we adhere to established precedent and conclude, accordingly, that the ordinance rezoning plaintiffs' property was a legislative act.

That classification meant that, under *Horn v County of Ventura* (1979) 24 C3d 605, reported at 2 CEB RPLR 114 (Aug. 1979), it was insulated from procedural due process constraints of notice and hearing for the adversely affected owners. Going one step farther, our legislature has said that development agreements are legislative, getting their approvals from the local legislative body (Govt C §65867.5(a)), even though such an agreement, when negotiated with a single developer over an integrated piece of property, might look much more like a quasi-judicial decision rather than a general policy enactment, and subject accordingly to narrower judicial review.

Although California legislators and judges approach the issue that way, not everyone else does. About a dozen state

courts have chosen to follow the position articulated by the Oregon Supreme Court in *Fasano v Board of County Comm'rs* (1972) 264 Ore 574 that

[W]e would be ignoring reality to rigidly view all zoning decisions by local governing bodies as legislative acts to be accorded a full presumption of validity and shielded from less than constitutional scrutiny by the theory of separation of powers. Local and small decision groups are simply not the equivalent in all respects of state and national legislatures.... "It is not a part of the legislative function to grant permits, make special exceptions, or decide particular cases. Such activities are not legislative but administrative, quasi-judicial, or judicial in character. To place them in the hands of legislative bodies, whose acts as such are not judicially reviewable, is to open the door completely to arbitrary government." [Citation omitted.]

Consequences of whether the activity is called legislative or administrative include not only deciding whether validity is tested by a deferential irrational and arbitrary test or by a more stringent substantial evidence one, but how those who want to oppose get to make themselves heard—the point on which the disagreeers were shot down on the Parkmerced Development Agreement.

It is hard for me to say that the negotiating of a local development concerning a parcel of land in western San Francisco—even one comprising over 150 acres—is comparable to the creation process route taken for an act of Congress in Washington and thereby entitled to the same judicial deference and restriction on constitutional due process challenges. The *Parkmerced* court opined here that development agreements are "conduct that does not fit well within the framework of adjudicatory decisions." 229 CA4th at 528. But when they are as site-specific as this one was, do they fit the framework of general legislation any better? Does the legislature's calling a development agreement "legislative" mean the courts have to agree if they think it isn't?