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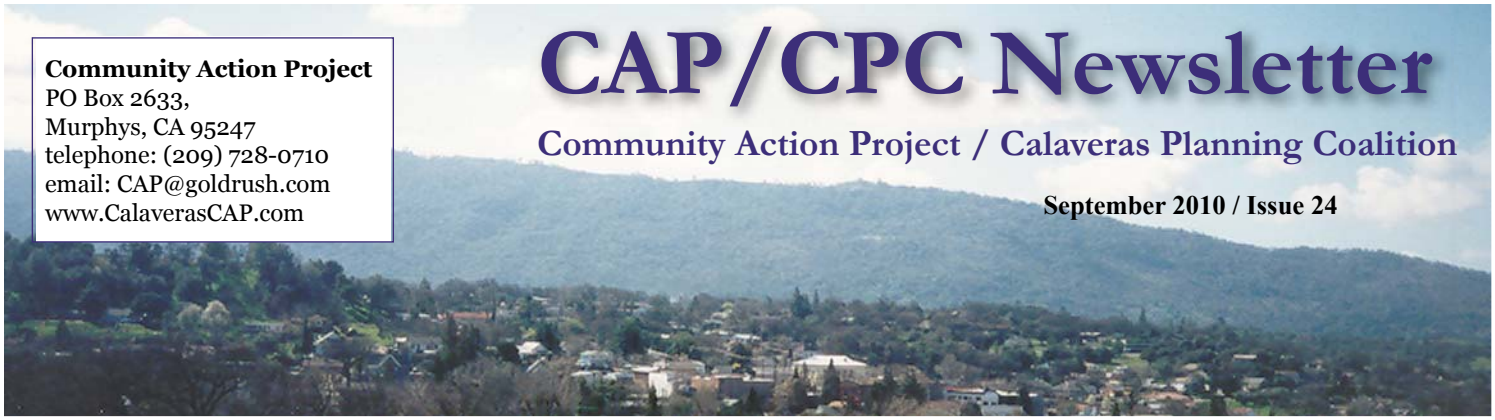
CAP/CPC Newsletter

Community Action Project / Calaveras Planning Coalition

September 2010 / Issue 24



In This Issue ...

Calaveras Planning Coalition Members

- Calaveras Child Care Council
- Central Sierra Environmental Resource Center
- Citizens for San Andreas
- CAP
- Ebbetts Pass Forest Watch
- FOCUS
- Foothill Conservancy
- Keep It Rural, Calaveras
- Mountain Ranch Community Club
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Good Planning Resolves Conflicting Interests

By Tom Infusino, Facilitator, Calaveras Planning Coalition

At the very beginning of a microeconomics class, I learned that even in a market economy it is the necessary role of government to define clear and defensible property rights. Then the "property" (labor, goods, land, etc.) is exchanged in the market to achieve an efficient allocation of resources.

Since personal interests regarding property frequently conflict (Buyers v. Sellers, Noisy Neighbor v. Light Sleeper, Air Polluter v. Breather, etc.) government at all levels is very busy defining how these property interests are balanced. With regard to the exchange of goods, the State of California has established statewide rules, the Commercial Code, to define the rights of both buyers and sellers in transactions. With regard to air pollution, there is a three-layered federalist collaboration between federal, state, and local officials in limiting the right to pollute, and protecting the right to breathe clean air. In the area of the density of land use, it is the County that defines the rights of the land owner and the rights of the public. As more development brings more parties and more interests into conflict (traffic, school, public service, police & fire protection, flooding, endangered species, etc.), the County's job in balancing these interests gets more complex.

One argument we hear from property rights interests is that a land owner should be able to do what ever he/she wants with his/her land, so long as it does not harm another. Well, settling those conflicts is exactly what the current system of land development is trying to do. It is identifying all the ways that land development may "harm another", and then balancing those interests by setting development densities, building setbacks, conditions of project approval, and mitigation measures.

One topic of debate in Calaveras County is whether the balance has tipped too far toward the property owner's interest to do whatever he/she wants, or too far toward the interests of everybody else to be free from harm. Land holders are appearing before the Board of Supervisors claiming that even the most preliminary steps of the general plan update are creating regulatory takings, and that the landowners have a constitutional right to government compensation.

There are constitutional limits that define the bedrock of property rights that cannot be taken by the government without compensation.

- To avoid being a 'taking', the regulation must have a rational relationship to a legitimate state interest (e.g. air quality, public safety, etc.).

- To avoid being a taking, the property owner must be left with an economically viable use of the property. If you bought land zoned for grazing, and other neighbors successfully run cattle, then denying your development of the agricultural land and letting you run cattle is not a taking.

Continued on page 2

Good Planning ... (con't.)

- To avoid being a taking, there must be a nexus between the regulation imposed and the harm being remedied. If the new home blocks the old road, then mitigation is to provide a re-routed road, not a public swimming pool.

- A remedy exacted from a developer cannot be so great that it is not roughly proportional to the harm the developer created. If the development requires a new road costing $1 million, the County cannot charge the developer $2 million dollars to put in the road.

- A taking must be ripe for adjudications, not just theoretical. You need to actually propose your development project and have it denied before you can claim a taking. A land use designation in a general plan, that can later be changed on a specific parcel by a property owner's application, does not create a takings dispute ripe for adjudication.

All the other balancing of interests through regulation is done without compensation to the party regulated, or to the party who is harmed.

Thus, there is no government compensation paid to the air polluter for the cost of installing emission control equipment to cut his air pollution by 40%. There is also no government compensation paid to the air breathers when the government allows the remaining 60% of the emissions to pollute the air they breathe. This non-taking balancing of interests makes up the vast majority of all regulation. Regulatory takings are rare. To date, the general plan and implementation proposals made by the Coalition and the County have all been within the non-taking balancing of interests.

Another topic of debate is, which forums are best for balancing these competing interests?

Is it best to allow investors to build land use conflicts (e.g. Noisy Night Club next to Light Sleeper) and then take all property disputes straight to court, as we did with nuisance law in the old days? Since it costs a lot to go to court, this allows developers to considerably deplete one's property values before one could seek a judicial remedy. Does anybody really want to pay for a court system so big that it can adjudicate all the nuisance, fraud, and negligence claims that would come forward when development projects get built outside the realm of government regulation of land use, property sales, and building construction? Do we really want to force investors to build their projects without the protection of government approvals, and then bear the risk that the Court will later rule: 1) that the project is a nuisance that must be abated, 2) that the project was fraudulently sold without disclosures and liable for damages, or 3) that the project was negligently constructed and liable for damages?

Is it best to have a public vote on all developments seeking a general plan amendment, or does this place too much power in the hands of existing residents?

> *Does anybody really want to pay for a court system so big it can adjudicate all the nuisance, fraud, and negligence claims that would come forward in the absence of planning?*

Or, is it best to create a set of prescriptive land use rules that apply to *everybody* (e.g. a General plan and accompanying zoning ordinances) that balance the competing interests? And, isn't it best to have a flexible process for balancing complex interests and to apply that process for each *major* development, e.g. CEQA (the California Environmental Quality Act guidelines) and the EIR (Environmental Impact Report)?

While it may be fun for some to debate these issues, the reality is that the County is not completely free to pick and choose the development approval process. The County's choices are limited by existing State law. There are specific legal requirements for completing a general plan, with specific elements, and with land use designations with specified land use intensities. There are specific legal requirements for evaluating impacts on public services and the natural environment, and for mitigating those impacts to the degree feasible. There are specific legal requirements that findings must be made, based upon substantial evidence, prior to the approval of a tentative subdivision map.

If some people want to change these State land use laws, they need to convince the Governor and the State Legislature to do so. They should take their arguments to the State. They should not waste everybody's time complaining to the Board of Supervisors over issues the Board has no jurisdiction or legitimate authority to change. They should not pretend that by electing a new supervisor, all of these state legal requirements will go away, or that the County will be free to jettison its development review process. They should not advocate the violation of these State laws by the County, for the cost of the economic gridlock caused by such protracted and fruitless litigation would be far greater than the value of any such symbolic gesture. They should not slanderously demonize citizens of good will and county staff who are working hard to plan for a brighter future. While continued philosophical debates about the role of government may be fun to some, they will not solve the real life problems being experienced by real people in our County today.

We could do better for property owners, property developers, and harmed parties if we all tried to work within the existing legal framework to better secure freedom of land use, freedom of development, and freedom from harm, at the local level, in those areas where the County has both jurisdiction and legal authority. There are opportunities to work together:

Continued on page 3

Good Planning ... (con't.)

- We could develop boilerplate menus of mitigation measures to both streamline development approvals and to reduce impacts.
- We could define land use designations to improve the market for conservation easements for willing sellers and willing buyers.
- We could improve our competitiveness to return our state and federal tax dollars to our County, so this money can fix our roads, store our water, keep our schools open, and keep our sheriff deputies on patrol.
- We could develop area-specific advisory boards to identify and to help resolve potential or ongoing land use conflicts among neighbors.
- We could identify actions the County could take to improve its partnership with the non-profit public service providers that care for those in need.
- We could develop fiscal health guidelines to steer the County's budgeting and tax/fee-setting processes.

If some people want to falsely wrap themselves in a veil of property rights or of public interests, just so they have an excuse to fight, to make threats, and to call people names, then that is their choice.

However, if as sincere advocates of private property rights or public interests, we have common goals to improve the productivity of the county's economy, the beauty of its environment, the vitality of its communities, and the security of personal liberties, then we should respectfully explore the aforementioned opportunities together.

The CAP/CPC Newsletter is produced by the Calaveras Community Action Project. CAP's fiscal sponsor is Ebbetts Pass Forest Watch.

For more information please contact CAP@goldrush.com.

Thank you.

Just What Does the U.S. Constitution Say About Land Use Planning, Anyway?

In the debate over Calaveras County's General Plan update, and whether the current process in some way runs counter to the United States Constitution, it might be useful to go back and briefly review the basics.

As we have all learned in school, all laws, including those involving land use, must not contradict the Constitution and its Amendments, and the final authority on this is the Supreme Court of the United States.

The body of the Constitution, in fact, says virtually nothing about land use or land use regulation. However, the Constitution's 5th, 10th, and 14th Amendments have been interpreted as relevant.

The 5th Amendment to the Constitution says in part "No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for a public use, without just compensation."

The 10th Amendment relegates all powers not assumed by the Constitution to the States. That is, the default power is with the States -- only those powers spelled out in the Constitution (as interpreted by any given Supreme Court) belong to the Federal Government. No powers regarding local land use are claimed by the Constitution for either the executive or legislative branches of government. The judicial branch, of course, has the power to interpret the Constitution and has at times chosen to do so in matters relating to land use regulations.

The 14th Amendment has been interpreted by the Supreme Court to mean, among other things, that the "due process clause" and the "takings" clauses of the 5th Amendment also apply to the States. That is, like the Federal Government, no State can deprive an American citizen of life, liberty, and property without due process. The same is true regarding the "takings" clause: no State can take somebody's private property without just compensation.

There have been several challenges to land use regulation and planning that have made it to the Supreme Court. Some have centered on the due process clause, but most have alleged that either some specific plan, or Planning itself, constitutes a "taking" of property.

For the purposes of this discussion, probably the most important of these cases is the 1926 case of City of Euclid, Ohio vs. Ambler Realty.

Here the plaintiff, Ambler Realty, took a position that will sound familiar to those following the Calaveras General Plan update. Ambler Realty owned a vacant 68-acre tract of land along a busy street adjacent to the railroad. The City of Euclid passed a law restricting the land to residential use only. Ambler alleged that the land use ordinance substantially reduced the value of the land, and that this constituted an unconstitutional "taking" of Ambler's "property." The Ambler case is important because Ambler asserted that *all* land use restrictions constituted a taking, not just the action affecting Euclid, so accordingly the Court's decision on this case was highly anticipated.

Quoting from his book "The Land We Share", Professor Eric Fryfogle describes what happened:

When the Court's ruling was handed down, legal readers wanted to know not just whether the Court upheld the ordinance but what legal standard it applied to judge the validity of such ordinances. It was on this point that the Court's ruling raised eyebrows across the land, pleasing urban planners and disheartening industrial and development interests. The key language, set apart by Justice Sutherland in a separate paragraph for emphasis, was breathtaking:

> *"If these reasons (in support of the zoning ordinance), thus summarized do not demonstrate the wisdom or sound policy in all respects of these restrictions*

Continued on page 4

Constitution & Land Use ... (con't.)

> *which we have indicated as pertinent to the inquiry, at least, the reason are sufficiently cogent to preclude us from saying, as it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."*

The language was hardly lilting, and no doubt every reader had to re-read the 73-word sentence.

But when fully parsed, its meaning was clear. No sentence in the history of land use law would take on more importance. The Court was not going to second-guess zoning laws. It made no difference, even, that the Court might think it unwise or might suspect the motives of the lawmakers who enacted it. A court's job in reviewing such laws was merely to provide a crude screen to keep out the most misguided ordinances.

To get caught in the screen and be declared unconstitutional, an ordinance had to be "clearly arbitrary and unreasonable." It had to have, the Court said 'no substantial relation to the public health, safety, morals, or general welfare."

The effect of all this was to give regulators vast powers to control land uses, should they choose to exercise them, even when their regulations greatly diminished land values. Land use planners could not have been more satisfied.

Although the Supreme Court's decision in Euclid went far in encouraging the new land-planning profession, it did little to assist them in their work. It said nothing about how zoning and private property fit together. It was silent about how regulators might assess the effects of what they did on private property as an institution. By all appearances, the divide between the public and private realms remained alive and intact in the law of private land.

Planners may have liked what they read, but those who thought seriously about private property were worried about the implications of this new clash of potent forces: expansive private property on one hand, and expansive public power on the other.

For either force to overwhelm the other seemed unwise, yet who would be in charge of charting a sensible, middle course?"

Who indeed? In *Euclid*, the Court gave sweeping powers to regulate land use, but didn't provide much guidance on what "property" was, at least in regards to Ambler's claim that what had been "zoned away" from them was their property, and as such they were entitled to compensation.

And it is this issue – whether or not an existing *land use designation* is in some way a landowner's property, and as such entitles the landowner to taxpayer-supported compensation if the change "takes" or reduces the property owner's self-assessment of its value -- that is the basis of many attacks on the General Plan update.

The Calaveras County Board of Supervisors meets Tuesdays at 9:00 am in the Supervisors Chambers at Government Center, 891 Mountain Ranch Road, San Andreas. Agendas are available on the County's website **http://co.calaveras.ca.us/cc/Departments/Supervisors/SupervisorsAgendaMinutes.aspx**

CAP: Bringing Together Community Groups & Individuals

The Community Action Project and the Calaveras Planning Coalition bring together community groups and individuals who are dedicated to planning for a better future for Calaveras County.

The CAP / CPC Mission:

Promote community-based democracy in Calaveras County so that local citizens have the maximum possible control of quality of life issues that affect them.

Our Vision:

- Preserve the rural quality of life in our County
- Protect our natural environment and our agricultural lands
- Promote locally owned viable businesses
- Provide jobs and housing for all residents
- Preserve our historical and cultural resources

The Values that Drive our Work:

- Strive to encourage the widest possible public participation in decision making
- Seek educational and economic opportunities for all citizens
- Maintain an open and transparent decision making process
- Create change and growth using a positive approach based on principles that protect both our citizens and our environment

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The Calaveras County Planning Commission meets every first and third Thursday at 9:00 am, unless otherwise posted, in the Supervisors Chambers at Government Center, 891 Mountain Ranch Road, San Andreas. Agendas are available on the County's website **http://co.calaveras.ca.us/cc/Departments/PlanningDepartment/PlanningCommission.aspx**

CAP Commentary:

County Position on Evaluating Planning Alternatives Gambles with General Plan Success

As the process of drafting a comprehensive update to the County's General Plan grinds on, just how serious the County will be in its evaluation of the diverse legally required alternatives to the Preferred Option – for both the County General Plan and the Community Plans - is coming into question.

In several public statements, Coalition Facilitator Tom Infusino has implored the Supervisors and the Planning Department to evaluate these planning alternatives in a fair, thorough, and responsible way. Court decisions seem to strongly suggest that this is what the law requires. Perhaps more importantly, going forward without a fair and balanced evaluation of all the planning alternatives effectively puts an end to meaningful public participation in the General Plan update.

Failing to thoroughly analyze alternatives also denies the Board of Supervisors the critical information they need to make a fair and responsible choice among real alternatives that reflect different points of view in our county.

In response to Mr. Infusino, the County's first position was that the law only required a simple "more than / less than" comparison of the alternatives to the so-called "Preferred Alternative". Later, in June, the County told Mr. Infusino that it didn't have the time or the money to do a proper comparison between alternatives, even though Mr. Infusino had identified several viable grant prospects to cover the additional costs. The County said that even taking the time to apply for grant funds that would be awarded *before the end of the year* (2010) would constitute an unacceptable delay to the General Plan update.

The need for haste in updating the General Plan has been a persistent theme of the County since the moment it resigned itself to doing the update several years ago. Initially, in 2006, the County's position was that the General Plan needed to be updated quickly for fear that growth and development might be impeded during the process. Today, with growth and development at a standstill in the County due to bad planning and the burst of the housing bubble, the County needs to fashion a new explanation for why there is need for haste in the General Plan update process.

In fact, by not doing the proper analysis now, the County risks even further delays. If the Board does change its mind about the preferred alternative, the County will have to further delay approval of the General Plan until it completes the requisite traffic and noise analyses.

This is an issue that would seem to be of importance to both advocates *and* opponents of smart and sustainable land use policies.

For those that want a return to the land use policies of the last 30 years, or even a return to the land use policies of the 19th Century, Calaveras County will not be evaluating those kinds of alternatives fairly. Of the three alternative growth patterns considered by the Supervisors, only the town-centric model for growth, the "Preferred Alternative" will be evaluated thoroughly. Alternative "D", the Tea Party-inspired "property rights" alternative, will not be evaluated thoroughly, if at all.

For those who want smart and sustainable land use planning in Valley Springs that promotes town-centric growth, helps build a healthy community, and raises property values, we know that this alternative will not be evaluated fairly. Only the secret Supervisor-driven developer-friendly process, selected by the Supervisors as the Preferred Alternative, will be evaluated thoroughly for the Valley Springs Community Plan.

This inevitably begs the question, why bother with doing alternatives at all? Obviously, California law requires that alternatives be considered in the planning process. This is intended to sponsor a fair competition of good ideas to help communities, and to allow Supervisors to consider a buffet of choices. But if that consideration is not done in good faith, if the fix is in from the moment the Preferred Alternative is chosen, why bother with *any* analysis of alternatives from that point on?

By indicating that *only* the Preferred Alternative will be given both quantitative and qualitative review and consideration, the County would seem to be signaling that the map issues have been decided. Whatever further public review or community participation may be scheduled, it would seem the process is essentially over and the major decisions have been made. But for citizens and taxpayers, trying to sensibly pick among general plan options with no quantitative analysis is like trying to decide what to buy when you won't find out how much it costs until *after* you bought it.

Courts have been asked to intervene and interpret these kinds of issues in the past. Calaveras County and its consultants are not the first to try and influence the outcome of what should be a community-driven process. By not evaluating Plan Alternatives adequately, the County is gambling with the success of the public's General Plan update, and with our future.