McGeorge Law Review

Volume 29 | Issue 3 Article 23

1-1-1998

Property

University of the Pacific, McGeorge School of Law

Interim Ordinances in California: Restoring Balance Between the Rights of Individual Landowners and the Rights of the Public

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Code Sections Affected
Government Code § 65858 (amended).
SB 927 (Ayala); 1997 STAT. Ch. 129

I. INTRODUCTION

The population of the state of California continues to increase.[1] Land is not as plentiful as it once was,[2] and natural resources are being depleted.[3] This has caused tension between property owners who want to use their land as they see fit, and others who want to preserve land and to prevent its development.[4] These differing views are accommodated in the legislative process of local governments. The act of legislating involves political compromise and trading, which produce policies that, in the aggregate, cause local governments to distribute resources and obligations in an equitable manner.[5]

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1. *See California's Population Increases 1%*, L.A. TIMES, Apr. 8, 1997, at 1 (observing that natural population growth has exceeded migration out of California). Migration from California is down, and net migration is expected to be a positive figure again by 1998. *Id.*; *see* Ernie Slone, *State Experts: Census Predictions Are Too Low*, ORANGE COUNTY REG., Oct. 22, 1996, at A19 (expecting California's population to rise to almost 50 million people, an increase of 56%, by the year 2025).

2. *See* Thor Kamban Biberman, *Home Lot Prices Skyrocketing in San Diego County*, SAN DIEGO DAILY TRANSCRIPT, June 10, 1997, at C1 (commenting on the severe shortage of land in San Diego County); *see also* Meg McConahey, *New Site Planned for Boys, Girls Club*, PRESS DEMOCRAT (Santa Rosa), Feb. 26, 1996, at B1 (describing the search throughout the Sonoma Valley for a suitable site for a clubhouse for the Boys and Girls Club). The Sonoma Valley has open space in the form of vineyards, however, there is no space for public needs. *Id.*

3. *See* Paul Raeburn, *Population Expert Sees A Dismal Future For Earth*, S.F. EXAM., Feb. 22, 1994, at A6 (noting that the earth's land, water, and cropland are disappearing rapidly).

4. *See* Michael D. McFarland, *Stop It Now*, FRESNO BEE, Nov. 16, 1996, at B6 (claiming it is necessary to stop growth and urban sprawl now). Problems of increased population in the Central Valley include air quality problems, water shortages, reduced land for agriculture, increased traffic problems, increased need for public infrastructure, and more police and prisons. *Id.*

5. *See* Daniel Mandelker, *Procedural Due Process*, C629 A.L.I.-A.B.A. 349, 367 (1991) (copy on file with *McGeorge Law Review*) (providing guidance for determining whether decision-making in the land use context is legislative or administrative); *see also infra* notes 36-43 and accompanying text (discussing legislative & adjudicatory due process requirements).

The California Constitution confers broad police powers on local governments to regulate the uses of land within their jurisdictions.[6] In the context of real property, police power includes the power of the state to regulate the use of land.[7] The courts will sustain the use of police power to control the use of land for public purposes if it bears a rational relation to the public health, safety, morals, or general welfare.[8] Courts will uphold the application of a general zoning ordinance to a particular property if it substantially advances a legitimate state interest and leaves the owner an economically viable use of his or her land.[9] Unless the impact of a regulation denies the owner the "justice and fairness" guaranteed by the constitution, it will likely be upheld.[10]

A comprehensive zoning plan arguably bears a rational relation to the legitimate state interest of protecting the public health, safety and general welfare. It is essential that cities and counties develop comprehensive plans so that development is organized and well thought-out. The Legislature requires local legislative bodies to develop a comprehensive, long-term general plan.[11] The procedure required for enacting a general plan or a zoning ordinance usually involves an investigation by a zoning board, preparation of a tentative report for the local legislative body, public notice and hearings, and publication of the ordinance as adopted.[12] However, as local governments take time to study and develop comprehensive plans, landowners may take advantage of the interim time to purchase land before the

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6. *See* CAL. CONST. art. XI, § 7 (providing that "a county or city may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with the general laws").

7. *See* Michael J. Volpe, *Stop-Gap and Interim Legislation, A Device to Maintain the Status Quo of an Area Pending the Adoption of a Comprehensive Zoning Ordinance or Amendment Thereto,* 18 SYRACUSE L. REV. 837, 837 (1967) (indicating that the effect of police power is negative and restraining).

8. *See* Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (stating that before an ordinance can be declared unconstitutional, the provisions must be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare"); *see also* Volpe, *supra* note 7 (commenting that the exercise of police power has been manifested in zoning laws which may only be upheld as constitutional if they bear a reasonable relation to the public health, safety, morals and general welfare).

9. *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (considering whether an enactment of a zoning ordinance constituted a taking).

10. *See id.* at 262-63 (remarking that "justice and fairness" are guaranteed by the Fifth and Fourteenth Amendment to the U.S. Constitution).

11. *See* CAL. GOV'T CODE § 65300 (West 1996) (requiring local governments to prepare and adopt a comprehensive, long-term general plan for the physical development of the land within their jurisdictions).

12. *See* Volpe, *supra* note 7, at 837 (detailing the conditions which must precede an enactment of every comprehensive zoning ordinance, and noting that it is a "cumbersome and time-consuming process").

restrictions become effective.[13] It is during this time period that interim ordinances, or "stopgap" ordinances as they were originally called, are enacted.[14]

Interim ordinances were initially used as a way to prevent growth while zoning ordinances were being studied,[15] to prevent growth in overburdened cities, and to stop development in environmentally sensitive areas.[16] However, they have been used to freeze development altogether and to inhibit a wide range of activities such as video arcades,[17] mobile homes,[18] fast food restaurants,[19] and adult entertainment businesses.[20]

Although freezing development is essential to effective planning, there have been concerns that the power to enact interim ordinances has been abused by local governments.[21] Even though a moratorium may be legally deficient, it may still achieve, at least temporarily, the desired goal of preventing development.[22] If invalidation of the development moratoria is the only available remedy, an illegally adopted development moratoria is a cost free method of delaying development.[23]

By using multiple "interim" ordinances, a local government can prevent a landowner from ever building on the land. In response to this problem, the Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*[24]

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13. *See* Linda Bozung & Deborah J. Alessi, *Recent Developments In Environmental Preservation And The Rights Of Property Owners*, 20 URB. LAW. 969, 1013 (1988) (declaring that without interim freezing, landowners can destroy a proposed plan before it takes effect); *see also* Volpe, *supra* note 7, at 838 (explaining that building activity may increase because of a fear on the part of the landowner that the use of property he or she has in mind may be prohibited by the new ordinance). Property owners hurry to acquire building permits under the existing ordinance so they may obtain rights which are not as easily divested by the new legislation. *Id.*

14. *See* 83 AM. JUR. 2D, *Zoning and Planing* § 161 (Supp. 1996) (describing interim or stopgap zoning as being designed to "bridge the gap between the study and enactment of a comprehensive plan"); *see also* Volpe, *supra* note 7, at 838 (characterizing stop-gap or interim ordinance as a means whereby the city uses its police power to protect the proposed legislation and freeze the status of the area being temporarily zoned while the planning and legislative process continues).

15. *See* Volpe, *supra* note 7, at 838 (indicating that "when zoning was in its infancy most municipalities enacted interim ordinances in an effort to hold the line while a comprehensive ordinance was prepared").

16. Bozung & Alessi, *supra* note 13, at 1012.

17. *See* Redeb Amusement, Inc. v. Township of Hillside, 465 A.2d 564, 573 (N.J. Super. Ct. Law Div. 1983) (holding that a temporary moratorium on coin-operated machines is a valid exercise of the municipality's police power).

18. *See* Plaza Mobile and Modular Homes, Inc. v. Town of Colchester, 639 F. Supp. 140, 145 (D. Conn. 1986) (stating that a local municipality that enacted a mobile home park moratorium was authorized to exercise regulatory power over mobile home parks).

19. *See* Schafer v. City of New Orleans, 743 F.2d 1086, 1090 (5th Cir. 1984) (upholding a temporary moratorium on the issuance of permits for fast food restaurants).

20. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 44 (1986) (discussing a moratorium on the licensing of businesses whose primary purpose was showing sexually explicit materials).

21. *See* Bozung & Alessi, *supra* note 13, at 1013 (noting the necessity of moratoria and the concerns regarding abuse of power).

22. *See id.* at 1013 (discussing zoning moratoria as regulatory takings).

23. *See id.* (discussing zoning moratoria as regulatory takings).

24. 482 U.S. 304 (1987).

established that moratoria, if excessive, may constitute a taking[25] requiring the payment of compensation from the initial time of taking.[26] The California Legislature also responded to the problem by enacting California Government Code section 65858.[27]

II. EXISTING LAW

Existing law allows a legislative body, considering a general plan, specific plan, or zoning proposal, to adopt an interim ordinance prohibiting any uses which may be in conflict with the plan(s) the legislative body is considering.[28] The legislative body is not permitted to adopt or to extend an interim ordinance unless the ordinance contains a finding that there is a current and immediate threat to the public health, safety, or welfare.[29] The interim ordinance expires 45 days from its date of adoption.[30] Additionally, no more than two extensions may be adopted.[31] California Government Code section 65858(e) provides that, when an interim ordinance has been adopted, every subsequent ordinance that covers the whole or a part of the same property, automatically terminates upon the termination of the first interim ordinance or any extension of that ordinance.[32]

III. NEW LAW

Chapter 129 allows a city council or county board of supervisors to adopt another interim ordinance after an earlier interim ordinance expires, if the new ordinance is adopted to protect the public safety, health, and welfare from an event different from the one that led to the adoption of the prior interim ordinance.[33] Chapter 129 declares that an ordinance in compliance with the new provision, that was in effect on or before April 14, 1997, shall be valid.[34] Chapter 129 also changes the type of finding required for the enactment of an interim ordinance from a "finding" to a "legislative finding."[35]

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25. *See* U.S. CONST. amends. V, XIV (prohibiting the taking of private property without just compensation); CAL. CONST. art. I, § 19 (same).

26. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 322. (1987).

27. *See* CAL. GOV'T CODE § 65858 (West Supp. 1997) (describing interim ordinances).

28. *Id.* § 65858(a) (West Supp. 1997).

29. *Id.* § 65858(c) (West Supp. 1997).

30. *Id.* § 65858(a), (b) (West Supp. 1997).

31. *Id.* § 65858(a) (West Supp. 1997).

32. *Id.* § 65858(e) (West Supp. 1997).

33. CAL. GOV'T CODE § 65858(f) (enacted by Chapter 129).

34. 1997 Cal. Legis. Serv. ch. 129, sec. 2 (West) (enacting CAL. GOV'T CODE § 685858).

35. CAL. GOV'T CODE § 65858(c) (amended by Chapter 129).

IV. CHANGING PROCEDURAL REQUIREMENTS

The Fourteenth Amendment to the United States Constitution, as well as Article I, Section 7(a) of the California Constitution, prohibits any government action that deprives a person of property without due process of law.[36] In the legislative context of land use law, this means that if a legislative decision is substantially related to the welfare of the region affected and is not arbitrary or capricious, the decision will be upheld as constitutional.[37] Legislative findings are used for this purpose. They do not concern specific parties, but are general facts which help the legislative body decide policy issues.[38] Legislative decisions are shielded from direct judicial review because they involve a high degree of visibility and impact a significant number of people.[39] The theory behind shielding legislative decisions from direct judicial review stems from the practical considerations of providing notice and hearing to a large number of people, as well as the belief that an appropriate remedy can be found in the ballot box.[40]

Adjudicatory decisions are treated differently.[41] Adjudicatory decisions involve applying policy rather than making policy.[42] They involve specific facts related to individual cases.[43] Findings of fact are required in proceedings so there is an evidentiary basis from which to review administrative decisions.[44] Findings of fact facilitate orderly analysis and minimize the likelihood that an agency "will randomly leap from evidence to conclusions."[45] Additionally, findings of fact allow the parties to see that administrative decision-making is "careful, reasoned, and equitable."[46]

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36. *See* U.S. CONST. amend. XIV (providing that no state shall "deprive any person of life, liberty or property without due process of law"); *see also* CAL. CONST. art. I, § 7(a) (stating that "a person may not be deprived of life, liberty or property without due process of law").

37. *See* Building Indus. Assoc. v. City of Camarillo, 41 Cal. 3d 810, 718 P.2d 68, 226 Cal. Rptr. 82 (1986) (noting that a growth control measure consisting of an initiative ordinance must still comply with requirements that it be substantially and reasonably related to the welfare of the region affected, cannot unfairly discriminate against a particular parcel of property, and cannot be arbitrary or capricious).

38. John J. Delaney, *Procedural Due Process Issues*, SB06 A.L.I.-A.B.A. 683, 686 (1996) (copy on file with *McGeorge Law Review*) (stating that legislative determinations "produce a general rule or policy applicable to an open class of individuals, interests or situations).

39. *See* Burt v. City of Idaho Falls, 665 P.2d 1075, 1077-78 (Idaho 1983) (noting that legislative activity produces policies or rules that apply to a class rather than specific individuals).

40. *Id.*

41. *See* Delaney, *supra* note 38, at 685 (noting that parties to a land use approval process are likely to receive greater due process protections if the proceeding is adjudicatory or administrative as opposed to legislative).

42. *See id.* (describing how legislative and adjudicatory actions differ).

43. *See id.* at 687 (stating that, as opposed to legislative facts, adjudicative facts "answer the questions of who did what, where, when, how, why, and with what motive or intent").

44. *See* Mandelker, *supra* note 5, at 358 (analyzing how states characterize land use decisions).

45. Topanga Ass'n. v. Los Angeles, 11 Cal. 3d 506, 516, 522 P.2d 17, 113 Cal. Rptr. 836 (1974).

46. *See Topanga*, 11 Cal. 3d at 517, 522 P.2d at 12, 113 Cal. Rptr. at 836 (describing the "public relations function" findings of fact provide).

The word "findings" is used in California Government Code section 65858.[47] This term can be ambiguous and has been confused to mean "findings of fact"[48] rather than "legislative findings."[49] Since legislative decisions are not subject to direct judicial review, there is no need to have an evidentiary basis for review, and therefore, no requirement for findings of fact. Because legislative decisions need not be accompanied by findings of fact, the requirement of Chapter 129 that legislative bodies make "legislative findings" rather than "findings" is more practicable, and in conformity with land use law.[50] Additionally, the conclusion of a local legislative body that there is a current and immediate threat to the public health, safety, or welfare which requires the adoption of an interim ordinance will be better insulated from judicial invalidation.

V. CHANGING THE "MARTIN RESULTS"[51]

Chapter 129 conforms the statutory language of California Government Code section 65858 to reflect what is needed in actual practice. While section 65858 was intended to prevent regulatory takings,[52] the language of the section proved unworkable. The Second District Court of Appeals, in *Martin v. Superior Court*,[53] considered California Government Code section 65858(e), and held that the words of the statute were clear.[54] The Court interpreted the language "subsequent moratorium ordinances terminate upon the termination of the first interim ordinance or any extension of the ordinance" as applying to every subsequent ordinance, not just to subsequent ordinances that were enacted while the original ordinance was effective and then improperly extended beyond a two-year limit.[55] The Court held that an interruption in the moratorium would not bring an interim ordinance outside

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47. *See* CAL. GOV'T CODE § 65858(c) (West Supp. 1997) (requiring that the legislative body not adopt an interim ordinance unless it contains "a finding that there is a current and immediate threat to the public health, safety, or welfare").

48. *See supra* notes 41-47 and accompanying text (describing findings of fact); *see also* SENATE HOUSING & LAND USE COMMITTEE, COMMITTEE ANALYSIS, May 5, 1997, at 3 (noting that the current statute uses an older drafting style that doesn't distinguish between legislative acts and administrative acts).

49. *See supra* notes 38-40 and accompanying text (describing legislative decisions); *see also* SENATE HOUSING & LAND USE COMMITTEE, COMMITTEE ANALYSIS, May 5, 1997, at 3.

50. *See* SENATE HOUSING & LAND USE COMMITTEE, COMMITTEE ANALYSIS, May 5, 1997, at 3.

51. "Martin Results" refers to the anomalous results achieved when § 65858(e) of the California Government Code is construed according to the holding in *Martin v. Superior Court*, 234 Cal. App. 3d 1765. *See infra* notes 45-58 and accompanying text (describing the limiting effects § 65858(e) of the California Government Code has on local governments).

52. *See supra* note 25-27 and accompanying text (describing the reason for the enactment of § 65858 of the California Government Code).

53. 234 Cal. App. 3d 1765, 286 Cal. Rptr. 513 (1991).

54. *Id.* at 1770, 286 Cal. Rptr. at 516; *see supra* note 32 and accompanying text (stating language of § 65858(e) of the California Government Code).

55. *See Martin*, 234 Cal. App. 3d at 1770-71, 286 Cal. Rptr. at 516-17 (concluding that "neither the rezoning of the property nor the expiration of the first moratorium ordinance prevents the plain application of § 65858(e) to every subsequent ordinance adopted pursuant to this section ").

the meaning of the statute.[56] The *Martin* decision prevented a local government from enacting any later interim ordinance on a piece of property, no matter how much time elapsed between the ordinances.

The City of Rialto, the sponsor of Chapter 129,[57] discovered this when enacting an interim ordinance in 1996 designed to create a temporary moratoria on adult entertainment businesses.[58] When a local adult entertainment business sued the City, a federal district court invalidated the 1996 ordinance based on the *Martin* decision.[59] The City had previously adopted an interim ordinance creating a ban on adult businesses in 1985 while it revised its zoning ordinance later that same year.[60] Even though there had been eleven years separating the ordinances, under *Martin*, once a city enacted a moratorium, any subsequent moratorium is invalid.[61]

Other possible situations may result from the *Martin* interpretation of California Government Code section 65858. For example, a county could not temporarily suspend building permits along a flooding creek after the 1997 storms if it had imposed them after the flood of 1995.[62]

Chapter 129 is intended to rectify potential problem scenarios such as those described above. Chapter 129 allows multiple interim ordinances, yet restricts their use to situations involving new health, safety or welfare justifications.[63] Thus, Chapter 129 is a balance between the rights of landowners and the needs of local governments. Local governments are protected from an outright ban on multiple interim ordinances and are able to adopt an interim ordinance if changes in the events or conditions warrant such a response.[64] Landowners are also protected. By requiring a change of conditions from those that caused the adoption of the original interim ordinance, local governments cannot unilaterally use interim ordinances to stop development. Therefore, Chapter 129 seems to be a fair and practical response to the problem of development moratoria, and a good balance between the rights of landowners and the needs of local government.

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56. *Id.* at 1771, 286 Cal. Rptr. at 517.

57. *See* SENATE HOUSING & LAND USE COMMITTEE, COMMITTEE ANALYSIS OF SB 927, at 3 (May 19, 1997) (listing supporters of Chapter 129).

58. SENATE HOUSING & LAND USE COMMITTEE, COMMITTEE ANALYSIS OF SB 927, at 1 (Apr. 28, 1997).

59. *See id.* at 2 (stating that a federal district judge declared the 1996 Rialto interim ordinance void).

60. *Id.*

61. *Id.*; *see supra* notes 53-56 and accompanying text (discussing *Martin v. Superior Court*).

62. *See* SENATE HOUSING & LAND USE COMMITTEE, COMMITTEE ANALYSIS OF SB 927, at 2 (Apr. 28, 1997) (listing examples of "absurd conclusions" that could happen if cities and counties are permitted to declare a moratorium on a property only once for any reason).

63. CAL. GOV'T CODE § 65858(f) (enacted by Chapter 129); *see supra* notes 28-35 and accompanying text (describing provisions of existing law and Chapter 129).

64. CAL. GOV'T CODE § 65858(f) (enacted by Chapter 129); *see supra* notes 28-35 and accompanying text (detailing provisions of existing law and Chapter 129).

VI. CONCLUSION

From the time of its inception, zoning has involved a struggle between an individual landowner and the rights of the public at large.[65] The increasing population, the scarcity of land, and the problems of urban sprawl have intensified this struggle in California.[66] It is the job of the legislature and local legislative bodies to allocate the resources in a manner most equitable to the majority of people. It is the job of the judiciary to make sure that no person is deprived of his or her constitutional right to just compensation for property that has been taken and to ensure fair enforcement of the laws. Thus, the rights of the public and individual property owners are protected.

California Government Code section 65858 was originally enacted to protect landowners from local governments who used interim ordinances as a ruse to circumvent traditional procedures required under regular zoning ordinances[67] thereby depriving property owners of due process. However, over time, local governments have become unfairly stymied by section 65858. They are unable to respond to current emergencies by using interim ordinances because of section 65858(e) and judicial interpretations of its language.[68] Chapter 129 rectifies this inequity and restores balance to the struggle between the rights of individual landowners and the rights of the public.

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65. *See* Euclid v. Ambler Realty Co., 272 U.S. 365, 389 (1926) (noting that the effect of the zoning ordinance on owners of land within the village borders would be a loss of value to their property, however, the majority of the city's population supported the zoning ordinance).

66. *See supra* notes 1-4 and accompanying text (highlighting the problems caused by urban growth).

67. *See supra* note 12 and accompanying text (describing the procedures involved in enacting a zoning ordinance).

68. *See supra* notes 45-56 and accompanying text (discussing the anomalous results provided by the *Martin* decision).