Adapting to Continually Evolving Land Use Regulation

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Government officials, developers and their respective lawyers who are tasked with understanding and abiding by new regulations and case law are accustomed to it: they must adapt, again and again. Modifications and new initiatives in federal, state and local zoning and land use governance—impacting development projects and the environment on numerous fronts—demand keeping pace with change. Such is the nature of land use.

Snapshots from around the country

Examples of recent changes to the regulatory landscape are plentiful across the country. Despite pending litigation, California developers who pursue infill projects in urban areas must adhere to the state's Sustainable Communities and Climate Protection Act of 2008 (SB 375). In Maryland, where conservation efforts center on the health of the Chesapeake Bay, new state-initiated stormwater-management laws have been enacted.

Across the United States, governments grapple with balancing the drive for economic freedom and growth with environmental, social and infrastructure concerns, such as transportation and affordable housing. For many states, the answer of late is more regionally focused land use regulatory structures that supersede local initiatives.

A panel of experienced attorneys gathered to discuss these complex challenges during a LexisNexis® CLE Webinar, *Emerging Trends in Land Use Regulation: What They Mean for Lawyers, Their Clients, and Local Governments*. The panel comprised Carol S. Rubin, Esq., associate general counsel of the Maryland-National Capital Park and Planning Commission; Anne M. Mead, Esq., and Emily J. Vaias, Esq., partners at Linowes and Blocher in Maryland; and Gary A. Patton, Esq., who at the time of the Webinar was Of Counsel to Wittwer & Parkin and is now a private land use practitioner in Santa Cruz, California.

Koontz v. St. Johns River Water Management District

Altering the perspectives of everyone in the land use community is the U.S. Supreme Court's June 2013 property rights decision in *Koontz v. St. Johns River Water Management District* (No. 11-1447). The case extends the holdings of *Nollan v. California Coastal Commission 483 U.S. 825 (1987)* and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) beyond the local, state and federal agencies' conditions of permit approvals to permit denials and to the agencies' ability to demand monetary exactions and fee-in-lieu payments as a condition for development approvals.

In 1994, landowner Coy Koontz sought permits to develop 3.7 acres of his 15-acre Florida wetlands property into a small shopping center. Koontz offered to deed the remaining 11 acres to the management district as a conservation easement to meet state mitigation requirements. The district said the 11 acres was insufficient and demanded the development be reduced to one acre, with the remaining land set aside as a conservation easement, or proceed with the development as proposed but pay the district to improve its own 50 acres of wetlands several miles away. Finding the demands excessive and that they constituted a taking without just compensation, Koontz sued.

The district argued that the simple demand for money did not implicate the proscription against the taking of property without just compensation required by the 5th Amendment of the U.S. Constitution.

"Nexus" and "Rough Proportionality"

In a split 5-4 decision, the U.S. Supreme Court reversed the Florida Supreme Court on grounds that "extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation."

In the wake of *Koontz*, the experts agree it is clear that a permitting agency's demand for monetary payment or a fee-in-lieu as a condition of development approval must have a "nexus" with the impacts of the development, and that the amount of the exaction must have a "rough proportionality" to the scope of that impact. The Maryland panelists, Carol Rubin, Anne Mead and

Emily Vaias, did not feel that the *Koontz* decision would necessarily impact the practice of negotiating mutually beneficial solutions for application conditions, but time would tell the impact, if any, of the *Koontz* decision on the development approval process.

The experienced panel cautioned that county and state agencies charged with issuing development approvals will need to carefully consider whether their fee-in-lieu programs satisfy the minimum requirements of the 5th Amendment. Additionally, property owners and developers now have a stronger basis to refuse unreasonable or extortionate demands that lack the "nexus" and "rough proportionality" required by the 5th Amendment.

Regionalized land use initiatives

For generations, planning, zoning and development regulation have been handled at the local level. A shift in recent years has state legislators and agencies calling the shots. Seeing local government's disregard for or inability to consider broader policy issues, the state has made its priorities mandatory by centralizing zoning and planning laws. In particular, states have targeted such social or physical issues as the environment, transportation and affordable housing.

According to the California experts, project-level decisions are supposed to be consistent with and implement established policies. For example, a local General Plan is supposed to specify basic land use policies that guide all project decisions.

The reality is often the opposite. A local agency tasked with approving a land-use project often finds itself, simultaneously, modifying the policy level, so that project decisions determine future policy, rather than the reverse.

To counteract this occurrence, the state has taken legislative action to ensure that high-priority state policies are actually achieved in the local decision-making process.

For example, under Government Code §65580 ff, California requires every city to adopt a housing element, which is updated periodically, to meet state-mandated housing units at various levels of affordability. Similarly, the state-designated "coastal zone" under Public Resources Code §30000 ff overrides local regulation of the coastal areas.

California SB 375

Among the most aggressive legislative initiatives in California is SB 375, which imposes statutory structures that take aim at global warming. Land use and transportation create 40 percent of greenhouse gasses in California. Consequently, statutory structures have expanded to promote smart growth by providing closer scrutiny of infill development in urban areas, encouraging sustainable communities and requiring targeted transportation planning with oversight by regional and local collaborating agencies.

SB 375 has three major components:

- Regional transportation planning efforts must strive to reduce greenhouse gas emissions consistent with the goals of AB 32, California's Global Warming Solutions Act of 2006
- Offer California Environmental Quality Act incentives to encourage projects that are consistent with a regional plan that achieves greenhouse gas emission reductions
- Coordinate regional housing and transportation needs while maintaining local authority over land use decisions

Stormwater management in Maryland

On the other side of the country, similar regionalized planning efforts are under way in Maryland that already or could impact local land use decisions and processes.

- **Stormwater Management Act of 2007**—Requires that environmental site design, through the use of nonstructural best management practices and other better site design techniques, be implemented to the maximum extent practicable.
- **Smart & Sustainable Growth Act of 2009**—Mandates local jurisdictions implement and follow comprehensive plans.
- **Sustainable Communities Act of 2010**—Offers enhanced rehabilitation tax credit and combines revitalization programs under one umbrella program.
- **Sustainable Growth and Agricultural Preservation Act of 2012**—Combines smart growth planning in locations that are planned for it and preserves farmland, forest and streams.
- **Phase II Watershed Implementation Program**—Emphasizes role of local partners in meeting EPA rules that limit the amount of nitrogen and other pollutants that enter the Chesapeake Bay.
- **Transportation funding**—The Department of the Environment has proposed a regulation that would require new projects meet mobile emissions standards under the Clean Air Act and would make metropolitan planning organizations responsible for carrying out the new rule.

Carol Rubin and Anne Mead, two of the panelists with experience practicing in Maryland, reviewed a few examples of the impact of some of these state initiatives on the local jurisdictions, regulations and priorities. They also warned of the need for practitioners to be aware of state legislation and programs, particularly now that the state is growing its role and reach in planning and land use matters.

What do emerging trends mean for practitioners?

With so much at stake and so many players pursuing agendas, it is more critical than ever for counsel representing development-related businesses to protect client interests. Practitioners must pay attention to court decisions impacting land use and monitor their implementation by authorities. They also must remain aware of statewide and regional planning discussions that continue to erode local control over land-use decisions. Because planning policies are becoming increasingly important, practitioners should be aware of, and, when possible, place their clients out in front on emerging policies.

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