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April 19, 2012

To: Laura O. Leal
Deputy coutny Administrator

Re: Town Hall Meeting - legal concepts and terms

Dear Laura:

When thinking of the legal issues regarding land use and regulation - let's start big. The Constitution of the United States grants to the states the "police powers" via the Tenth Amendment - meaning the states can broadly regulate for the health, safety, morals and general welfare of the community.

So here is what the government can do:

It is through the Constitutional authority that states grant to local municipalities the right to regulate land - for the same purposes on a more local level. This is commonly known as zoning. When a municipality institutes zoning regluations, they must start with a General Plan. These types of plans are to lay the foundation for how the community will operate and make optimal use of the land to benefit all. A common plan designates areas for such things as housing, commercial use, traffic control, noise control, open areas, conservation of natural resources, landfills etc. The Specific plan comes into play when the zoning or use ordinances begin to take shape and the city can grant the administration of these issues to a appointed board. This is also know as Euclidean zoning in case that term is used.

In general, zoning laws will be upheld unless they are arbitrary or capricious.

Spot zoning is where one parcel of land (or a small group of parcels) is being treated differently than another parcel of land next to it. This is generally invalid unless there is

a legitimate purpose for the health, safety and welfare of the community.

Sometimes the use of a parcel of land will be in compliance with zoning regulations and then the zoning regulations will change. At this point the parcel is said to have a **non-conforming use.**

In cases like this, if the owner is made to immediately stopped from using the land, it could be considered a taking which we will talk about later. Normally, the owner of the land is able to stay with his non-conforming use until he can ammortize his loss. However, there are some restrictions here. No expantion or increase of the business or structures would be allowed will in non-conforming use state and if the property is destroyed, his non-conforming use must cease and the owner must rebuild under the current zoning laws.

If a zoning ordinance creates a unique hardship on a particular owner of a parcel, he may apply for a **variance.** In order to get a variance though, he must show a hardship that was not self-created and that it impairs his land in a way that is particular to him alone. The variance may not cause any harm or disrupt the aesthetic harmony of the neighborhoodl or community as well.

Conditional Use Permits are also available. (CUPS) CUPS can be granted to a business for that specific use. But it is absolutely legal and right for a city to control the time a business can operated - agains this falls under the externalities or secondary effects or crime or public safety that is well within the police powers of the state and local authorities.

Changes in zoning: If the conditions of the area have changed significantly, it can be requested that the zoning be changed as the original plan seems to have fallen out of favor. If something once was residential and is now obviously commercial in nature, a zoning change should be requested. It would not make sense to hold someone to a zoning ordinance in such a situation.

Takings:

A taking occurs when the government takes private property for public use - and is called Eminent Domain.This often occurs when a new freeway needs to be built or an on/off ramp. The Constitutional restriction on this activity comes from the 5th Amendmen'st Due Process of the Constitution which states that the goverment may not deprive one of life, liberty or property without Due Process of law. The 5th Amendment is incorporated to the states via the Fourteenth Amendment.

What this means is that if the government believes it is necessary to take the land for a public use, they must provide just compensation. Just compensation is fair market value of the land in it's optimal use. This is the Substantive Due Process right but there is also the Procedural Due Process right which must be included. Procedural Due Process requires that the individual be given notice, a meaningful opportunity to be heard and a record of the hearing for some type of redress or appeal. In order for the government to institute Eminent Domain, this is required - Procedural Due Process and Just Compensation. The taking must be for the PUBLIC good. There was a very big and controversial Supreme Court decision called *Kelo v. New London* where privat land was taken and sold to a private company for a development and this was upheld as a constitutional taking. The rational was that the jobs created and tax revenues the private business would bring would ultimately benefit the public. After that decision, many states, including California, amended their constitutions to narrow this rule. So here, the taking must be for a public necessity of some sort and the land in question must be necessary to further the need - a balancing test between the public good and the individual harm must be carefully implemented.

There are two types of takings - physical and regulatory. A physical taking can include taking the entire parcel, severing it and taking part, or just physically occupying a portion of one's land.

If there is a severance of the property and the government takes only a portion, they

must pay fair market value for that portion and they must also pay severance damages for the remaining land if there was any diminution in value.

Zoning is not a taking, but if a regulation goes so far as to render the land with no viable economic value - then it can be considererd a regulatory taking. So if there is no way the landowner can use his land because of the regulation, he must be paid just compensation of fair market value. This is so even if the taking is temporary in nature. There was a case concerning a Lutheran Church retreat where they were barred from any building on the land after it was flooded and their buildings destroyed. The court found that it was a taking for that period and the church was compensated for that time in which they were unable to use their land due to the regulation.

If regulations go so far that the landowner believes there has been a taking, then the action is called ***Inverse Condemnation.*** So instead of the government notifying the landowner their land is being taken or restricted, the landowner believes this has been done to them without procedural due process and can bring an action.

For condemnation to occur it must be a tangible invasion of the property, substantial damage to the property due to governmental action, or cause a burden and harm that is specific only that parcel of land. For instance, there was the Causby case where the military planes had a path of glide that went so low over a farm that it blew the leaves off the trees, shook the house and worse of all, the chickens that were a commercial enterprise for the farm were so scared they flew into walls and killed themselves. Although the plane did not tangibly invade, there was sufficient damage and it made it impossible for people to live there. The burden and harm suffered was unique and particular to that parcel of land only so it was held that it was a taking on a charge of inverse condemnation.

Control Through Zoning and Equal Protection:

Under the Fourteenth Amendment's Equal Protection Clause, equal protection is

expressly granted. It means that citizens who are similarly situated must be treated equally.
If there is discrimination; the court will look to see whether it is a suspect class, a quasi suspect class or a non-suspect Class and scrutinize the constitutionality of the regulation.

A suspect class would involve discrimination based on race or national origin. In the case of a zoning ordinance discriminating either on it's face or in effect, the court would apply strict scrutiny and the law would be struck down unless the government coudl show that there was a compelling governmental interest, narrowly tailored and using the least restrictive means necessary.

Land use regulations usually deal with the Non-suspect class: Age, Wealth, anything that is more social and economic in nature. For discrimination in this class the Rationa Basis test is used and the law will generally be upheld if it is rationally related to a legitimate government interest - a lower burden and the challenger bears the burden of proof. This might come into play when
zoning laws require a certain size home to be built on a lot and a poorer person claims they are being discriminated against because they can't afford to build a big home. A legitimate government interest is almost anything that is not arbitrary or capricious - anything that makes even a small amount of sense, like - aesthetics of the neighborhood. Or perhaps a XXX book store is being discriminated against - but the legitimate government interest will be the "externalities" or secondary problems that accompany businesses like that which would include crime, drugs, prostitution etc.

But a zoning law that bans the feeble minded may not serve any legitimate interests unless the property is unsafe.

Zoning and Freedom of Speech issues:
Freedom of Speech/Expression is granted by the First Amendment and incorporated to the states via the Fourteenth Amendment.

The government cannot ban speech but it can regulate the time, place and manner. This is often the case when it comes to signs and billboards and sometimes nude dancing.

For the zoning regulation to be upheld, it must be content neutral, be for a substantial government interest, narrowly tailored to achieve that interest and leave open alternative channels of communication. So, for instance cities have been able to ban totally nude dancing, requiring pasties and g strings because they are not trying to regulate or restrict the expression or message just the conduct. In addition, the secondary externalities of a strip clubs is a substantial governmental interest and they cannot ban them but can restrict the areas where they are allowed to operate for the health, safety, welfare, morals and even the aesthetics of the public at large.

Commercial Speech: which is advertising has a slightly lower level of protection that political speech so as long as the regulation is completely unrelated to the content and is for another purpose that is legitimate under the police powers it can be regulated.

A sign on site that advertises the business can't be banned however as the public has a specific interest in knowing what businesses are available and what they do - either to use them or even to avoid them such as XXX places.

Wow, this subject has so much detail and yes that was short notice so I hope I've included what you need and if not, please contact me asap with any questions.

Sincerely,

Deputy county counsel

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April 19, 2012

To: Will T. Frank

From: Sole Practitioner
Main St.
Santa Rosa, CA

Dear Mr. Frank:

Sorry to hear of your frustration...let's see what we can do. If by landlocked, you mean that there is absolutely no ingress or egress onto the land? To have a true landlocked situation, it must be more than mere inconvenience, but let's assume that it is landlocked.

The first thing we can do is do a title search and search the Grantor/Grantee and Grantee/Grantor indexes and find out if perhaps there is some sort of easement that grants you access to your parcel that you just aren't aware of. We'll need to start with the last name of the Grantor, (the person who sold you this property) and work backwards in the Grantor/Grantee index and then use the Grantee/Grantor index and search forward. If we're lucky we might find a recorded easement. We also want to confirm that the two acres of property was from a common grantor which I'll exlpain later.

During the Executory stage of your sales contract there is an implied **warranty of marketable title** which insures that the seller is giving you good title. Marketable title is one that is free from reasonable doubt, but not all doubt. Some things that make a title

unmarketable would be any encumberences like liens, mortgages, current violations of covenants, breaks in the chain of title, title by adverse possession, adverse possessors in current use, ordinance violations,encroachments, Unreasonable risk of litigation, and in your case, ~~the biggie,~~ **ACCESS.** There should have been a search of the title records and the seller should have been given notice and fair opportunity to cure by closing. But since that didn't happen, and now the contract has **merged with the deed** we have to talk about that deed and what remedies you might have there.

I would first ask you what kind of deed you purchased - was it a Warranty Deed, Limited Warranty Deed or Quit Claim? A **warranty deed is the best kind** and offers the most protection. It covers defects that existed prior to and during the seller's possession. It contains all 6 covenants which are the **1) The covenant of seisin** (which means the seller has in indefeasible estate to convey) **2) the covenant of encumberances** (which means there are no encumberances that the seller did not disclose to you) and the **3) covant of right to convey**, which basically means the seller has the legal right by ownership or power of attorney to convey the property. These are call the present covenants because their breach happens upon conveyance and that is when the statute of limitations begins to run. The covenant of encumberances was breached here as accessibility to your property definitely affects it's use and value and something like that should have been disclosed.

The future covenants are **# 4) The covenant of quiet use and enjoyment** (which means that nobody who claims they have paramount title will show up and try to evict you), **5) The covenant of further assurances** (which means the seller will do whatever he can in the future to perfect your title) and **6) the General Warranty** (not to be confused with the deed) which is a covenant similar to #4. The breach of these covenants occurs at the time of an eviction and that is wen the statute begins to run.

The Limited Warranty Deed also contains the six covenants but only covers the time period for which the seller had seisin of the estate - any defects prior to that are not covered. With a quit claim deed - buyer beware as you are only being conveyed

exactly the interest the seller has to convey (which could be nothing in some cases). Even with a **quit claim deed** however, there is an implied marketability of title which includes access.

The action we most likely will take if you are truly landlocked is to bring an action against the seller for an **easement by necessity**.

An **easement** is a non-possessory right to enter the land of another for a specific use thereon. That would be an affirmative easement which grants one a use instead of a negative which would restrict a use. Anyway, common easements are things like driveways, sidewalks, pathways and such across another's land for a purpose benefiting the other parcel of land. Easements like this are appurtenant because two parcels of land are involved, one if benefited by the easement and is called the dominant tenament and the other is burdened by the easement and is called the servient tenament. Because an appurtenant easement is attached to the land for the benefit of the land and not the person who owns the land, it will stay with the estate and benefit subsequent purchasers.

<u>An easement by necessity</u> can be created for ingress and egress when a parcel of land is landlocked. There are three things that we must have in order to prevail:

1. There must have been a common grantor. That's why it is important to search these titles and find out that when the two acre tract that you purchased was severed it was once owned by a common grantor.
2. There must be reasonable necessity. In some jurisdictions this means absolute and in some reasonable necessity - but like I said earlier, if it's just inconvenient to get there - like an alternate route is longer than a shortcut as the crow flies, then it might not qualify. So, of course I need to know more and we should look at the tract on Google Earth and inspect that aspect carefully.
3. Continuous - the easement will terminate when the necessity terminates so if another access route opens up, your easement will be lost. That might be good or bad depending upon what happens.

There is a last resort - you could create an **easement by prescription**. What you would have to do is make a road, or use and existing one exactly as an owner would, over a certain length of time - a statutory period, it then becomes an easement that is enforceable at law. The requirements for this to happen is that you use it in a hostile manner - and I don't mean MEAN or Violent, I mean against the consent or wishes of the owner - without his consent. It also must be done openly and notoriously - in other words, not under cover of darkeness but in a way that puts the world on notice that you are doing it and it must be actual - which is using it as your access road and continuously for the statutory period which, I'll have to check, but is ~~something like~~ 5 - 10 years.

Yes, I know that last resort doesn't sound like the best option, but I had a law professor once who created an easement across a neighbor's property for "Larry's Dog Walking Trail" by that exact method.

So,let's start by trying to find an existing easement, if we can't we'll look into a remedy under Covenants of Title, bring an action for an easement by necessity if there was a common grantor and keep our fingers crossed.

You have a few options - we need to meet so that I can gather more information and optimize the plan of attack for you.

Sincerely,

Sole Practitioner

END OF EXAM