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Good Planning Resolves Conflicting Interests

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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.

- 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 wat 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?

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:

- 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.