

Police Power

The legal basis for all land use regulation is the police power of the city to protect the public health, safety, and welfare of its residents. *See Berman v. Parker*, 348 U.S. 26, 32–33 (1954). A land use regulation lies within the city’s police power if it is reasonably related to the public welfare. *See Associated Home Builders, Inc. v. City of Livermore*, 18 Cal. 3d 582, 600–01 (1976).

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As Justice William O. Douglas, speaking for the United States Supreme Court, stated about the police power:

An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. . . .

Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it. The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled.

Berman, 348 U.S. at 32–33 (citations omitted)

This statement is recognized by California courts as “a correct description of the authority of a state or city to enact legislation under the police power.” *Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 861 (1980).

The police power, even though recognized by common law, is set forth in the California Constitution, which confers on cities the power to “make and enforce within [their] limits all local police, sanitary and other ordinances and regulations not in conflict with general laws.” Cal. Const. art. XI, § 7.

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The California Supreme Court has stated:

Under the police power granted by the Constitution, counties and cities have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law. [Citation

omitted.] Apart from this limitation, the “police power [of a county or city] under this provision . . . is as broad as the police power exercisable by the Legislature itself.”

Candid Enters., Inc. v. Grossmont Union High Sch. Dist., 39 Cal. 3d 878, 885 (1985)

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Land use regulations are a manifestation of the local police powers conferred by the California Constitution, not an exercise of authority delegated by statute. See *Scrutton v. County of Sacramento*, 275 Cal. App. 2d 412, 417 (1969). For example, state zoning laws pertaining to adoption of local zoning regulations are not intended as specific grants of authority, but as minimum standards to be observed in local zoning practices. As stated by the California Supreme Court:

We have recognized that a city’s or county’s power to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state. See, e.g., *Candid Enters., Inc. v. Grossmont Union High Sch. Dist.*, 39 Cal. 3d 878, 885–86 (1985) (upholding a school facilities impact fee imposed by a county without statutory authorization); *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 140–42 (1976) (upholding city rent control initiative despite lack of express statutory authority).

DeVita v. County of Napa, 9 Cal. 4th 763, 782 (1995). See also *Big Creek Lumber Co. v. City of Santa Cruz*, 38 Cal. 4th 1139, 1151 (2006) (land use regulation in California historically a function of local government under the grant of police power contained in the California Constitution)

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The police power is an elastic power. It allows cities to tailor regulations to suit the interests and needs of a “modern, enlightened and progressive community” even as those interests and needs change. *Rancho La Costa v. County of San Diego*, 111 Cal. App. 3d 54, 60 (1980). Regulations are sustained under current complex conditions that but a short time ago might have been condemned as arbitrary and unreasonable. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

In the 1970s, Justice Douglas, speaking for the United States Supreme Court, upheld a village’s zoning ordinance relating to land use restrictions on single-family dwelling units. His opinion identified the interests that supported the village’s exercise of its police power at the time:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. This goal is a permissible one within *Berman v. Parker*, *supra*. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974)

Today, many cities face needs and interests different than those identified in *Village of Belle Terre*. Regulations permitting smaller yards, denser housing, and narrower streets, so as to provide more housing within already developed areas, now address some cities’ changing needs. Such regulations are as proper an exercise of a city’s police power as were those in *Village of Belle Terre*, thanks to the elasticity of that power. However, a city’s police powers may be limited by the California State Legislature. See *Legislative Preemption*, in this chapter.

An expansive range of interests can support a city's exercise of its police power. The California Supreme Court has held that aesthetic reasons alone can justify the exercise of the police power. *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 881–82 (1996) (upholding a city's public art fee ordinance); *Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 858–59 (1980) (upholding in part a city's total ban of offsite advertising signs).

The United States Supreme Court also upheld land use regulations citing aesthetics as a valid rationale. In upholding a local ordinance prohibiting the posting of signs on public property, the Court stated that aesthetic concerns are substantial governmental interests properly addressed under a city's police power. See *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984). Similarly, in upholding New York City's Landmark Preservation Law, the Court approved of the city's use of its police power to enhance the quality of life by preserving “desirable aesthetic features of a city.” *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 129 (1978).

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A city's ability to limit big-box retail stores was recently upheld on police power grounds in *Wal-Mart Stores, Inc. v. City of Turlock*, 138 Cal. App. 4th 273 (2006). Wal-Mart challenged a city zoning ordinance prohibiting the development of discount superstores as exceeding the police power. The court held that the police power empowers cities to “control and organize development within their boundaries as a means of serving the general welfare.” *Id.* at 303.

Courts have held that regulations affecting economic interests in real property also are an appropriate exercise of the police power. See, e.g., *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 158 (1976) (regulations implementing local rent control laws are valid); *Griffin Dev. Co. v. City of Oxnard*, 39 Cal. 3d 256, 261–62 (1985) (regulations relating to condominium conversions are proper).

Although it did not directly address the police power, the United States Supreme Court, in *Kelo v. City of New London*, demonstrated the breadth of this power in holding that a city may condemn land for the purpose of economic development. 545 U.S. 469 (2005).

Protection of a city's “character,” “stability,” and “soul” has served to justify invocation of the police power. In *Ewing v. City of Carmel-by-the-Sea*, homeowners challenged the constitutionality of a zoning ordinance prohibiting transient commercial use of residential property for remuneration for less than 30 consecutive days. 234 Cal. App. 3d 1579 (1991). The homeowners claimed the ordinance was a taking, was void as arbitrary and vague, and violated their right of privacy. In ruling for the city, the court held that the ordinance was a proper exercise of the city's land use authority under its police power “to enhance and maintain the residential character of the city.” *Id.* at 1590. The court stated that this is a wholly proper purpose of zoning:

Protection of a city's “character,” “stability,” and “soul” has served to justify invocation of the police power.

It stands to reason that the “residential character” of a neighborhood is threatened when a significant number of homes—at least 12 percent in this case, according to the record—are occupied not by permanent residents but by a stream of tenants staying a weekend, a week, or even 29 days. . . . [Transient] rentals undoubtedly affect the essential character of a neighborhood and the stability of a community. Short-term tenants have little interest in public agencies or in the welfare of the citizenry. They do not participate in local government, coach little league, or join the hospital guild. They do not lead a Scout

troop, volunteer at the library, or keep an eye on an elderly neighbor. Literally, they are here today and gone tomorrow without engaging in the sort of activities that weld and strengthen a community.

Id. at 1591

In holding that the ordinance was related to a legitimate governmental goal, the court continued:

Blessed with unparalleled geography, climate, beauty, and charm, Carmel naturally attracts numerous short-term visitors. Again, it stands to reason that Carmel would wish to preserve an enclave of single-family homes as the heart and soul of the city. We believe that this reason alone is “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.” [Citation omitted.]

Id. at 1591–92

Judicial review of a city’s exercise of its police power is closely circumscribed. The California Supreme Court established the following rule:

It is a well settled rule that determination of the necessity and form of regulations enacted pursuant to the police power “is primarily a legislative and not a judicial function, and is to be tested in the courts not by what the judges individually or collectively may think of the wisdom or necessity of a particular regulation, but solely by the answer to the question is there any reasonable basis in fact to support the legislative determination of the regulation’s wisdom and necessity?”

Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 522–23 (1962)

The California Supreme Court has stated that a land use restriction withstands constitutional attack if it is fairly debatable that the restriction in fact bears a reasonable relation to the general welfare.

Predictably, this test has resulted in substantial judicial deference when reviewing a city’s decision to exercise the police power. *See Remmenga v. California Coastal Comm’n*, 163 Cal. App. 3d 623, 629 (1985); *Santa Monica Beach Ltd. v. Superior Court*, 19 Cal. 4th 952, 962–63 (1999) (advocating a hands-off policy for reviewing local legislative acts). Indeed, so long as “it is fairly debatable that the restriction in fact bears a reasonable relation to the general welfare,” a land use regulation should withstand constitutional attack. *Associated Home Builders, Inc. v. City of Livermore*, 18 Cal. 3d 582, 601 (1976).

In exercising the police power, the city must act within all applicable statutory provisions so there will be no “conflict with general laws.” The city’s actions also must meet constitutional principles of due process: they must be reasonable and nondiscriminatory, and not arbitrary or capricious. *See, e.g., G & D Holland Constr. Co. v. City of Marysville*, 12 Cal. App. 3d 989, 994 (1970).

Legislative Preemption

As broad as its police power is, a city cannot act where the California State Legislature has enacted laws which completely occupy the field. *See, e.g., Morehart v. County of Santa Barbara*, 7 Cal. 4th 725, 747 (1994); *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 483–85 (1984). Under the California Constitution, a city’s ordinance cannot conflict with the state’s general laws that preempt the subject matter.¹ A conflict exists between a local ordinance and state

1. For an excellent discussion of preemption, *see Preemption of Local Land Use Authority in California* (Governor’s Office of Planning and Research, 1989).

law if the ordinance “duplicates, contradicts or enters an area fully occupied by general law, either expressly or by legislative implication.” *Viacom Outdoor, Inc. v. City of Arcata*, 140 Cal. App. 4th 230, 236 (2006). For example, the recently expanded Housing Accountability Act directs local jurisdictions with regards to housing elements and affordable housing, and preempts a city’s discretion to deny certain types of affordable housing projects. Gov’t Code § 65589.5. Another example is Government Code section 65858 relating to interim ordinances, which preempts the field of “moratorium” ordinances. *See Bank of the Orient v. Town of Tiburon*, 220 Cal. App. 3d 992, 1001 (1990) (city’s interim moratorium ordinance may not exceed the two-year maximum prescribed in state law). *See also Morehart*, 7 Cal. 4th at 761 (county’s zoning ordinances relating to merger of antiquated lots were impliedly preempted by the merger provisions of the Subdivision Map Act). The scope of the state’s preemption can be broad. For example, the Legislature has adopted health and safety policies and criteria for establishment of certain types of selected residential uses that preempt local zoning. *See Health & Safety Code § 1597.40(a)* (preempting local zoning and other regulations with respect to family day care homes); *Health & Safety Code § 1566.3* (preempting local zoning with respect to residential facilities serving six or fewer mentally disabled or handicapped persons). However, preemption may not be found where the Legislature has not fully occupied a subject matter. For example, in *Viacom Outdoor, Inc. v. City of Arcata*, the city’s demand that the owner obtain a permit to rebuild storm-damaged billboards pursuant to its building and sign codes was not preempted by state law because the state law (the California Outdoor Advertising Act) did not categorically prohibit local legislation and explicitly invited augmentation from local authorities. 140 Cal. App. 4th at 246.

Under the Supremacy Clause of the United States Constitution, Congress may preempt both state and local law through federal regulation. For example, the Federal Telecommunications Act (47 U.S.C. § 253) precludes states and cities from passing laws that would prohibit any entity from providing telecommunications services. In *Qwest Communications, Inc. v. City of Berkeley*, the city’s telecommunications ordinance was pre-empted by section 253 because it burdened city service providers with regulations and requirements that had the effect of prohibiting companies from providing telecommunication services in the city. 433 F. 3d 1253, 1257–58 (9th Cir. 2006).

State Statutory Framework for Land Use Decisions

The following state laws provide most of the legal framework within which a city must exercise its police power in the context of land use regulation:

- Establishment of local planning agencies, commissions, and departments. Gov’t Code § 65100 *et seq.*
- General and specific plans. Gov’t Code § 65300 *et seq.*
- Zoning regulations. Gov’t Code § 65800 *et seq.*
- Subdivision Map Act. Gov’t Code § 66410 *et seq.*
- Development agreements. Gov’t Code § 65864 *et seq.*
- California Environmental Quality Act. Pub. Res. Code § 21000 *et seq.*; Cal. Code Regs. tit. 14, §§ 15000–15387 (also known as the CEQA Guidelines)

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CEQA = California Environmental Quality Act

- Ralph M. Brown Act. Gov't Code § 54950 *et seq.* (also known as the Open Meeting Act, or simply the Brown Act)
- Permit Streamlining Act. Gov't Code § 65920 *et seq.*
- Mitigation Fee Act. Gov't Code § 66000 *et seq.*

The City Council

The city council of a general law city is made up of five council members, one of whom is the mayor.² Gov't Code §§ 36501, 34900, 36801. The mayor has the duty of presiding at all meetings of the city council. Gov't code § 36802. In a chartered city, organization and power of the city's government is subject to control by the city's charter, which may provide for a different number of council members. Cal. Const. Art. XI § 5(a); *Socialist Party v. Ubl*, 155 Cal. 776 (1909).

The city council makes three types of decisions: legislative, quasi-judicial, and ministerial. Legislative acts are general policy decisions, such as general plan revisions (*see* chapter 2) and zoning ordinances (*see* chapter 4). Legislative acts are binding only when they are approved by the city council. Quasi-judicial acts are decisions that apply legislative policy to individual development projects. These decisions are generally made by the city council or the planning commission. Ministerial acts are those acts in which the city has no discretion, such as the mandatory issuance of a permit if certain conditions are met. Because they involve no discretion, ministerial decisions are often delegated to city staff.

The Planning Commission

The planning commission is a permanent committee of five or more citizens who have been appointed by the city council, or the mayor in some cities, to review and act on matters related to planning and development.

A city need not create a planning commission. Gov't Code § 65101. In fact, in some jurisdictions, especially smaller ones, there is no planning commission and the city council serves in that capacity. Gov't Code §§ 65100, 65101.

The planning commission holds regularly scheduled public hearings to consider land use matters, such as the general plan, specific plans, zonings and rezonings, use permits, and subdivisions.³ Depending upon a city's local ordinance, planning commission membership may change at the pleasure of the mayor or council, or at the expiration of fixed terms.⁴ In general law cities with an elected mayor, the mayor appoints, but such appointments must be approved by the council. Gov't Code § 40605; 89 Ops. Cal. Atty. Gen. 178, Opinion No. 05-914 (Aug. 14, 2006).

A city council may assign any or all of the following tasks to its planning commission:

2. The governing body of a county is generally the board of supervisors. Cal. Const. Art. XI § 1(b); Gov't Code § 23005.
3. In some cities, some of these matters also may be considered by a zoning administrator or a design or architectural review board.
4. Suggested reading material for planning commissioners includes:
 - *The Planning Commissioner's Book* (Governor's Office of Planning and Research, 1998)
 - *Planning Commissioner's Handbook* (League of California Cities, 2004)
 - William Fulton and Paul Shigley, *Guide to California Planning* (Solano Press, 3rd ed. 2005)

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- Assist in writing the general plan and community or specific plans, hold public hearings, and recommend action on proposed amendments to such plans. Gov't Code §§ 65103, 65353
- Investigate and make recommendations to the city council regarding reasonable and practical means for implementing the general plan or elements of the general plan, so that it will serve as an effective guide for orderly growth and development, preservation and conservation of open space and natural resources, and the efficient expenditure of public funds relating to the subjects addressed in the general plan. Gov't Code § 65400
- Provide an annual report to the city council on the status of the general plan and progress in its implementation, including progress in meeting the city's share of regional housing needs, local efforts to remove governmental constraints on housing, and compliance of the general plan with the guidelines in the Government Code. Gov't Code §§ 65584, 65583(c)(3), 65040.2
- Hold hearings and make recommendations on proposed changes to the city's zoning ordinances and zoning maps. Gov't Code § 65854
- Hold hearings and act on subdivision maps. Gov't Code § 66452.1
- Annually review the city's capital improvement program and the public works projects of other local agencies for consistency with the general plan. Gov't Code §§ 65401, 65403
- Consult with and advise public officials and agencies, utilities, organizations, and citizens regarding implementation of the general plan, and promote public interest in the general plan. Gov't Code § 65351
- Coordinate local plans and programs with those of other public agencies. Gov't Code § 65352
- Report to the city council on the conformity of proposed public land acquisition or disposal with the adopted general plan. Gov't Code § 65402
- Undertake special planning studies as needed. Gov't Code § 65101

Most often, the commission acts in an advisory capacity to the city council on land use matters. In some instances, the commission's decision on a project is referred to the city council as a recommendation for action (*e.g.*, general plan amendments and rezonings). In other instances, depending on state law and local ordinance provisions, it is considered a final action unless appealed to the council (*e.g.*, subdivisions, variances, and use permits). If a matter has been referred or appealed to the council, it may choose to follow the recommendation of the commission, reverse or modify the commission action, or send the project back to the commission for further review.

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Planning Staff

A city's community development or planning department is the commission's and city council's staff. These city planners advise the commission or council on the city's general plan, specific plans, zoning ordinance, subdivision ordinance, and other land use regulations. In addition, they provide background information and recommendations on the proposals that are under consideration, answer technical questions, and make sure that meetings have been properly noticed. The commission and council also are advised by other members of the city's staff, including the city attorney's office and the public works department.

Public Meetings

The planning commission and city council hold regular meetings and special meetings as needed. Although usually held separately, such hearings may be jointly noticed and held, if both bodies agree to a joint hearing process.

The planning commission and city council hold regular meetings and special meetings as needed. Although usually held separately, such hearings may be jointly noticed and held, if both bodies agree to a joint hearing process. For the most part, state law requires public hearings before planning actions are taken. At its meetings, the planning commission weighs all city and planning proposals in light of federal, state, and local regulations and potential environmental effects; it also listens to testimony from citizens and other interested parties. If necessary, the commission or council generally (though not always) may continue a hearing to a later time to allow more information to be gathered or to take additional testimony. The commission and council usually consider several items at each hearing, considering each item separately and taking action before moving on to the next item on the agenda.

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Pursuant to the Brown Act, all meetings, including study sessions and workshops, must be open and public. Gov't Code § 54950 *et seq.* This means that a quorum of commissioners can discuss commission business only in a public meeting. For a more thorough discussion of the Brown Act and its restrictions for communications between members of the public and members of the commission or council, *see* chapter 17 (Rights of the Regulated and of the Citizens).