

DIRT Periodic Development for Tuesday, April 22, 2014  
*Foothill Communities Coalition v. County of Orange*

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*Foothill Communities Coalition v. County of Orange* (2014) 222 CA4th 1302

Many courts leap automatically from spot zoning to invalidity. Here is a description of a recent California decision that inserted a thoughtful step in between.

**THE EDITOR'S TAKE:** Existing residents of upscale areas who hope to keep their surroundings free of new developments that they fear may degrade their attractiveness are likely to find their ability to do so reduced by this decision.

In this case, a church proposed to construct a senior housing project on seven acres of land that had been donated to it. Since such a project did not qualify for any kind of "as of right" approval under the applicable general or specific plans-which had been written back in 1982, when no one was thinking about elder housing-those plans had to be amended to justify creation of a new zoning classification for that kind of housing, and the zoning ordinance and map had to be amended to designate the church's land with the new label. Local government officials were willing to take all these steps, but the neighbors were not.

The resisting neighbors had many persuasive-sounding challenges. Amending a general plan is always a more suspect activity than its original enactment, and judicial review inevitably takes into account-even if only implicitly-apprehension as to whether the change was truly dictated by bona fide considerations (such as discovering an original mistake or seeing a recent change of circumstances) rather than a desire to do a favor for a friendly supporter. The change becomes even more suspicious when its purpose is not to make an across-the-board amendment but is instead designed to enable the reclassification of a single piece of land. Planning and zoning are supposed to treat all properties in a district uniformly, which is the exact opposite of what happens when a single parcel is rezoned and everything else is left the way it was. (In other states, those considerations often lead courts to treat the rezoning as an adjudicative rather than a legislative act, even though done by elected officials; in California, however, it is called "quasi-legislative," which gives it the benefit of subjecting it to review by ordinary mandamus, with its loose "arbitrary and capricious" standard, rather than by administrative mandate and the more stringent "substantial evidence" test.)

Project opponents often succeed when they can persuade judges to label the government's action as "spot zoning"-what this court calls "irrational discrimination"-making the rezoning sound ipso facto bad. Whether up spot zoning or down spot zoning, treating one parcel of land differently from all others just does not seem compatible with the concept of a "general" plan or with our constitutional requirement of equal protection. What makes this decision noteworthy is the court's determining that this was spot zoning without thereupon leaping to the conclusion that it was therefore automatically bad. Once the spot zoning label was not allowed to itself decide the case (as apparently it did at trial), it was easy for the court to go on to decide that the changes were not arbitrary or capricious, even though only one spot was involved.

When zoning laws first got started, worries about constitutional legitimacy were serious enough as to make the early enabling acts and zoning ordinances apply as uniformly within districts as possible. But that was 90 years ago; the way land use regulation is managed nowadays makes it look much more like horse trading than policy-driven legislating, but we have all gotten quite used to it. – *Roger Bernhardt*

The Roman Catholic Diocese of Orange and Kisco Senior Living, LLC sought to build a living community for senior citizens on a parcel of land owned by the Diocese (the Project). The parcel was subject to both the County's general plan, regulating land use within the County, and the North Tustin Specific Plan (NTSP), regulating land use within the specific

area where the parcel was located. Under the NTSP, the area was zoned as a residential single-family district. Seeking approval for the Project, the Diocese submitted a project design plan to the County. After the County Board of Supervisors and the County Planning Commission conducted public hearings on the zoning issue, the Board determined that the Project served the goals of the general plan and the NTSP and also complied with the California Environmental Quality Act. The Board issued one ordinance and two resolutions approving the Project and making changes to the NTSP zoning designation of the parcel from residential single-family district to residential senior housing district, to permit development of the multiple dwelling structure.

Foothill Communities Coalition, an unincorporated association of grassroots community groups and area homeowners (Foothill), challenged the Board's decisions as impermissible "spot zoning." The trial court entered judgment for Foothill and issued the requested writ of mandate. The court of appeal reversed the judgment, holding that the Board's findings of consistency with the County's general plan and with the NTSP were supported by substantial evidence.

The court noted that in cases of alleged "spot zoning," the court must first determine whether spot zoning has taken place and, if so, whether the "spot zoning" is permissible under the circumstances. Here, the court held that a zoning determination that creates an island of property with less restrictive zoning in the middle of properties with more restrictive zoning constitutes "spot zoning." To determine if the "spot zoning" was permissible, the court considered two issues:

- Whether the spot zoning was in the public interest; and
- Whether the Board's decision was arbitrary or capricious or devoid of evidentiary support.

The court found the record indicated that the Project met the housing goals of the County's general plan and was consistent with the land use design goals and policies of the NTSP. In addition, the court held that the Board's actions were a legitimate exercise of the County's police powers for the benefit of the public. The court of appeal remanded with directions to conduct further proceedings on environmental review issues that the trial court had not reached.

In addition, the court rejected Foothill's argument that changing the zoning designation that benefited the Diocese's "faith-based mission" violated the establishment clause. The court held that a zoning change or issuance of a special use permit does not create an entanglement between government and religion just because the landowner or operator is a religious organization. Furthermore, the record showed the County had a secular purpose, i.e., providing housing to a growing population of senior citizens with the County.