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Borton Petrini LLP
1600 Truxtun Avenue
Bakersfield CA 93301
e-mail bpcbak@bpclaw.com

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Editor:

G. Brandon Martin
(661) 322-3051

Future Growth in California's Inland Counties May Rest in the Hands of Voters

By Brandon Martin

The future of residential real estate development in California's steadily growing inland population centers may be heavily influenced by the history of planning struggles in California's Central Coast and its coastal metropolitan areas. Renowned planner and Ventura City Councilman William Fulton describes the key split in planning culture as a "tale of two Californias" – not a split between northern and southern, but coastal and inland California. Fulton's Solimar Research group notes that the vast majority of the 671 land use initiatives placed on city and county ballots during the period between 1986 and 2000 were placed on ballots in coastal and metropolitan areas. Nevertheless, because the steady development of residential real estate in many of California's inland counties has been slowly creating a significant socio-cultural change with homeowners increasingly viewing themselves as investors concerned with land use policy in their communities, it is reasonable to expect that planning in the form of direct democracy will drastically affect residential real estate markets in these regions in the future. The following is a briefing on "ballot box planning" in the form of three frequently asked questions by friends and clients in California's central regions:

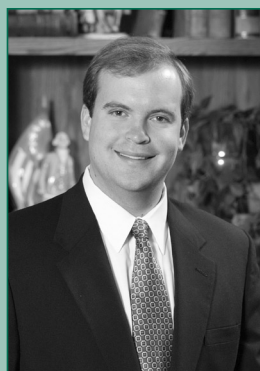
1. IS "BALLOT-BOX PLANNING" LEGAL IN CALIFORNIA?

Yes. In 1974, the Supreme Court overruled a 1927 decision with an opinion in *San Diego Building Contractors Ass'n v. City Council* holding that the state's constitutional initiative procedures could be used to determine land use policy. Since that landmark decision, the courts have repeatedly upheld the use of "ballot-box planning" as a land use procedure while maintaining that local land use initiatives that attempt to accomplish an unconstitutional taking or avoid state or federal laws are invalid.

Nevertheless, it is important to obtain counsel familiar with both land use planning and elections law to draft and review proposed ballot measures because the language must still

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G. Brandon Martin



G. Brandon Martin is an attorney in the Bakersfield office of Borton Petrini LLP. He received his undergraduate degree from University of California, Los Angeles, graduating summa cum laude. He received his Juris Doctor from Boalt Hall School of Law, University of California, Berkeley.

While at Boalt Hall, Brandon served on the staff of the Samuelson Center for Law, Technology and Public Policy.

Brandon's primary areas of practice with Borton Petrini LLP are real estate law, land use planning, civil litigation, intellectual property law, entertainment law and business formation and planning.

He is a member of the State Bar of California and is active within the business real estate, and professional community, staying current with legal and societal developments related to business and industry.

RECENT DEVELOPMENTS IN HOA LAW

By Matthew Trostler

Homeowner associations, typically defined as a nonprofit corporation or an unincorporated association which is created for the purpose of managing a common interest development, are governed by the Davis-Stirling Common Interest Development Act which can be found in the California Civil Code sections 1350-1378. This statutory scheme defines the role of the governing documents of the community (typically CC&R's, rules and regulations and bylaws), ownership rights and interests (including common areas, improvements to separate interests and easements), association governance (typically including elections, meetings, managing agents and dispute resolution procedures) and operations (fiscal matters, insurance and assessments). Common interest developments are increasing in number in California and it has been recently estimated that one out of four Californians live in some type of common interest development. Nationally, as of 1999, 42 million Americans live in community associations.

BRIEF STATUTORY CHANGES FAVORING HOMEOWNERS

In 2006 the Legislature made modifications to certain provisions of the Davis-Sterling Act. These modifications include changing the procedures involved in assessments and foreclosures and the way HOAs can apply both regular and special assessments to homeowners. Essentially, foreclosing has become more difficult for the HOAs. Moreover, owners are entitled to special notice requirements as to the association's intentions to foreclose. Now, the association must distribute a written notice to each member of the association during the 60-day period immediately preceding the beginning of the association's fiscal year. The statutory scheme provides specific language which must be used in providing this notice before foreclosure.

The ability of the HOA to collect on assessments has also been changed. There is a new "meet and confer" program which must be followed as well as a new right for a homeowner to request alternative dispute resolution with a neutral third party before the association may initiate foreclosure proceedings against the owner's separate interest.

Finally, homeowners have been granted access to association documents. These documents include essentially all financial documents of the HOA, agendas and meeting minutes and membership lists. These documents must now be produced by the HOA after a homeowner's request (subject to very limited exceptions).

NEW CASE LAW DECISIONS AGAINST ASSOCIATIONS

Oak Park Calabasas Condominium Association v. State Farm (2006) is a case which arose out of Los Angeles County. State Farm Fire & Casualty Company denied insurance coverage to the Oak Park Calabasas Condominium Association when a construction company (ECC) sued Oak Park for failing to pay its bills after the construction company made repairs to damaged structures in the association. This case involves over a decade of litigation. In January 1994, the Northridge Earthquake caused significant structural damage in the Oak Park community. As a result, Oak Park made agreements with the construction company to repair the damaged structures. Following several contractual modifications, Oak Park refused to pay amounts

owed under the contract. ECC recorded a lien on June 1, 1995. By July 1995, ECC sued Oak Park and the owners of the condominiums for breach of contract, foreclosure of a mechanic's lien and other causes of action. Oak Park then tendered the ECC complaint to its insurance carrier State Farm. State Farm, which provided a Directors and Officers policy (D&O), questioned whether there was any coverage and denied a defense for the ECC litigation to Oak Park and its owners, claiming that liability coverage under the D&O policy was limited to tort liability, and not contractual obligations. In 2002, ECC obtained a judgment against Oak Park in an amount in excess of \$7 million. By 2003, Oak Park sued State Farm.

The case went to trial in late 2004 and the trial court found that there was no potential for coverage for the ECC action and the judge entered judgment for State Farm. Oak Park appealed in 2005. The appellate court agreed with the trial court. The appellate court noted that the insurance policy in question expressly defined "wrongful acts" as conduct sounding in negligence, i.e., negligent acts, errors, omissions or breach of duty. The court analyzed these words to determine if these words "cumulatively referred to coverage for torts and thus are covered under the policy as contended by Oak Park, or whether these words were exclusively to breach of contract indemnification as contended by State Farm and thus are not covered under the policy." The appellate court ultimately held that Oak Park wanted to "enrich itself" by forcing State Farm to pay for the property loss which Oak Park simply chose not to pay due and owing to ECC.

Matthew Trostler



Matthew J. Trostler is the Managing Partner of the Los Angeles office of Borton Petrini LLP. He received his undergraduate degree from the University of Southern California earning a major in psychology and a minor in English, with an emphasis in expository writing. He earned his Juris Doctorate from California Western School of Law in 1991 where he was a contributing editor for the law school newspaper.

Matthew's primary areas of emphasis at Borton Petrini LLP are insurance and real estate law with an emphasis in the defense of homeowner associations and property management companies. His wide-ranging experience in the field of insurance has provided additional insight to insurance carriers through seminars defining and discussing insurer regulations in California.

Matthew has significant experience in arbitrations, mediations and jury trials. Some of his verdicts have been published statewide and nationally. His aggressive applicational style is tempered by his sense of fairness and compassion.

This case is a prime example of a situation where a homeowner's association has no insurance coverage for the mistakes made by the association or its past boards. Although the association may have been "negligent" in not paying ECC, the court held that the dispute essentially rested upon breach of contract, which was not covered under the D&O insurance policy.

Another important case was recently decided in New Jersey. *McCarthy v. Twin Rivers Homeowner's Association* (2006) involved a situation where a committee of residents in a planned community sued their association (board of directors and president of the board) for the right to post political signs on the property of community residents and on common areas, equal access to the community's official newspaper and access to the association's financial records, despite CC&R's and rules prohibiting these activities. Ultimately, the New Jersey Appellate Court found in favor of the homeowners. The court acknowledged the growth of planned communities consisting of privately owned homes and commercial buildings that were open to the public but were trust-owned properties and facilities for the exclusive use of residents and their invited guests. The court went on to expand its argument by claiming that much like a shopping mall, the community was like a town that delivered a broad range of traditional municipal services to its residents. As such, the community had a quasi-municipal status which subjected it to the constitutional protections set forth in the state constitution. Accordingly, the court found in favor of the members and against the board, association and president.

Although this is a New Jersey decision, the New Jersey State Constitution is very similar to the California State Constitution. The New Jersey Appellate Court essentially applied constitutional limitations upon this private development (termed "quasi-municipality"). In the exercise of fundamental rights, the New Jersey Appellate Court discerned no principal basis for distinguishing between the general public at large and the members of the community association. The New Jersey Appellate Court held that "Plaintiffs ... are powerless, without freedom of expression, to affect the rules that govern them for daily living. The public interest encompasses an accommodation between the right of the [private property] owner and the right of individuals who are parties with him in consensual transactions relating to the use of the property."

In its defense, the board of directors claimed the "business judgment rule" which essentially allows for judicial deference of board director's actions so long as directors are disinterested in the issue and act in the best interests of the community. However, this court overruled the business judgment rule in this case. Individuals who volunteer their time to become board members should realize that their powers are not absolute and courts will interfere with a board's judgment when fundamental rights are involved.

CONCLUSION

The statutory changes and recent cases tend to indicate that the power of the HOA's governing board is receding while homeowner rights are expanding. Boards should be aware of this trend. Its power has limitations and courts may intervene in its activities provided fundamental rights are at stake.



DISCLAIMER: THE INFORMATION PROVIDED IN THIS UPDATE IS NOT A SUBSTITUTE FOR LEGAL ADVICE. READERS SHOULD BE ADVISED THAT IF THEY HAVE QUESTIONS ABOUT THIS OR ANY OTHER AREA OF REAL ESTATE LAW, THEY SHOULD SEEK THE ADVICE OF COMPETENT COUNSEL SPECIALIZING IN REAL ESTATE LAW.

FUTURE GROWTH IN CALIFORNIA'S INLAND COUNTIES MAY REST IN THE HANDS OF VOTERS

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comply with several laws that drafters inexperienced in either land use planning or elections law may be unfamiliar with. As a general rule, it is important to make sure that any action taken via initiative will be classified by courts as "legislative" and not "adjudicative" or "administrative" and that they achieve general plan consistency. It is also important to remember that a local or county initiative cannot excuse non-compliance with state or federal laws and regulations or work to defeat state or federal preemption of legislative areas.

2. HOW CAN "BALLOT-BOX PLANNING" INFLUENCE THE RESIDENTIAL REAL ESTATE MARKETS?

Land use initiatives and referenda have a great potential to rapidly retard or expand residential real estate development because, as a general rule, plans instituted via the initiative system cannot be deviated from except through a direct vote of the people. This allows homeowners to protect the value of their investments if they believe that a glut of new homes may exceed demand and drive down the market price for property. Homeowners may also choose to slow growth in certain areas to preserve the value of their property even if the connection between the growth and their property values is dubious at best.

Two examples of land use initiatives that could have a stunting effect on real estate development in inland counties are the SOAR (Save Open Space and Agricultural Resources) and CAPP (Citizens Alliance for Public Planning) initiatives. SOAR measures tend to establish urban growth boundaries within a county and provide that no development may occur beyond those boundary lines without a vote from the people. CAPP measures are even more extreme because they typically require voter approval for any project that would meet a low size or impact description such as projects that involve construction of 20 or more new homes.

3. I'M A DEVELOPER. WHAT CAN BALLOT-BOX PLANNING DO FOR ME?

It can save you time and money. Going through the "typical" planning process makes it difficult to raise necessary development capital because at the end of the day the viability of a project comes down to the vote of a few politicians who might not even have been elected to office at the time that the development process began. The initiative process does not provide the developers with an absolute right to build, but it can provide the necessary general plan amendment and zoning changes to effectively entitle the property for use through an election process that will be completed in less than a year.

Please feel free to contact Brandon Martin at 661-322-3051 if you have any additional questions about the initiative process and how it can be an effective tool to accomplish your objectives.

LAW OFFICES OF Borton Petrini LLP

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Bakersfield

1600 Truxtun Avenue
Bakersfield, CA 93301
(661) 322-3051
E-mail: bpcbak@bpclaw.com
Managing Partner: George Martin

Fresno

2014 Tulare Street, Ste. 830
Fresno, CA 93721
(559) 268-0117
E-mail: bpcfirs@bpclaw.com
Managing Partner: Dave Petrie

Los Angeles

707 Wilshire Blvd., Ste. 5100
Los Angeles, CA 90017
(213) 624-2869
E-mail: bpcla@bpclaw.com
Managing Partner: Matthew Trostler

Modesto

1104 12th Street
Modesto, CA 95354
(209) 576-1701
E-mail: bpcmod@bpclaw.com
Managing Partner: Brad Post

Orange County

201 E. Sandpointe, Ste. 510
Santa Ana, CA 92707
(714) 424-6200
E-mail: bpcoc@bpclaw.com
Managing Partner: Rosemarie Lewis

Sacramento

11025 Trade Center Dr., Ste. 150
Rancho Cordova, CA 95670
(916) 858-1212
E-mail: bpcnac@bpclaw.com
Managing Partner: Mark Newman

San Bernardino

290 North D Street, Ste. 500
San Bernardino, CA 92401
(909) 381-0527
E-mail: bpcsbdo@bpclaw.com
Managing Partner: Dan Ferguson

San Diego

402 W. Broadway, Ste. 880
San Diego, CA 92101
(619) 232-2424
E-mail: bpcsd@bpclaw.com
Managing Partner: Paul Kissel

San Francisco

463 Pacific Avenue
San Francisco, CA 94133
(415) 677-0730
E-mail: bpcsf@bpclaw.com
Managing Partner: David Bremer

San Jose

99 Almaden Blvd., Ste. 700
San Jose, CA 95113
(408) 535-0870
E-mail: bpcsj@bpclaw.com
Managing Partner: Sam Phillips

www.bpclaw.com

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